# RECORD, CASE No. 14,932.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., 1458.

LAU OW BEW, APPELLANT,

*vs.*

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**FILED NOVEMBER 16, 1891.**

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United States Circuit Court of Appeals for the 9th Circuit,
October Term, 1891.

LAU OW BEW, Appellant,
*vs.*
UNITED STATES, Respondent. } No. 12.

*Transcript of Record*

(On appeal from the circuit court of the United States for the northern district of California.)

1 IN THE

# Circuit Court of the United States.

NORTHERN DISTRICT OF CALIFORNIA.

2 IN THE MATTER OF LAU OW BEW, }
ON HABEAS CORPUS. }

*To the Hon. Lorenzo Sawyer, Judge of the Circuit Court of the United States, Northern District of California:*

The petition of Lou Chung respectfully shows:

That Lau Ow Bew is unlawfully imprisoned, detained, confined, and restrained of his liberty by Captain Smith, Master of the steamship *Oceanic*, in the City and County of San Francisco, State of California, Northern District of California.

3 That the said imprisonment, detention, confinement, and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by said Master that said passenger is a subject of the Emperor of China, and must not and cannot be allowed to land under the provisions of section 6 of the Act of Congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," as amended by the Act of July 5, 1884.

That said passenger does not come within the restrictions of said Acts, but, on the contrary, your petitioner alleges:

That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein:

That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the City of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

4 That said firm is worth $40,000.00, and said passenger has a one-fourth interest therein, in addition to other properties.

That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports.

That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the Steamship *Oceanic* on the 11th day of August, A. D. 1891.

That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said

5 proofs, and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884.

That the reason the said passenger failed to procure said certificate so required as aforesaid by the said section 6 of said Act is, that the Chinese government could not issue said certificate, because they could not ascertain, as required by said law, the nature and character of the business carried on by said petitioner, where and how long carried on, and estimated value thereof, nor

could the United States Consul visé said certificate as required by law, because he could not ascer-
6 tain the truth of the facts which might be set forth therein.

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted direct to the said Master, commanding him to have the body of said passenger before your Honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor concerning him, together with the time and cause of his detention and said writ; and that he may be restored to his liberty.

Dated on the 14th day of August, 1891.

LOU CHUNG, Petitioner.

HARVEY S. BROWN, and
THOS. D. RIORDAN,
Attorneys for Petnr.

7 STATE OF CALIFORNIA,
*City and County of San Francisco*,
Northern District of Calfornia,
United States of America. } *ss.*

Lou Chung, being duly sworn, says that he is the petitioner above named, and that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

LOU CHUNG.

Subscribed and sworn to before me this 14th day of August, A. D. 1891.

F. D. MONCKTON,
Commissioner of the Circuit Court of the United States for the Northern District of California.

Let the writ of *habeas corpus* issue pursuant to
8 the prayer of the petition, returnable on August 15, 1891. And when the within named petitioner

is produced, let him be admitted to bail in the sum of $1,500.

JAMES H. BEATTY, Judge.

[ENDORSED:] Filed August 14, 1891.
L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*.

*The President of the United States of America, to Captain Smith, Master of the Steamer Oceanic, greeting:*

9 You are hereby commanded that you have the body of Lau Ow Bew by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Honorable the Circuit Court of the United States for the Northern District of California, at the Court-room of said Court, in the city and county of San Francisco, California, on or before the 15th day of August, 1891, or in case the steamer on which said petitioner is detained has not cleared on that day, as soon as practicable after clearance, but before the departure of the steamer, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

10 I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States for the Northern District of California, do hereby certify the foregoing to be a true copy of the writ of *habeas corpus* issued in the within-entitled matter.

Attest my hand and seal of said Circuit Court, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

I hereby certify that on the 14th day of August, 1891, I received the writ of which the within is a copy, and that on the 14th day of August, 1891, at San Francisco, in this district, I personally served the said writ by delivering to and leaving the same with Captain Smith, of the steamship *Oceanic*.

Dated San Francisco, Cal., August, 1891.

11 W. G. LONG, U. S. Marshal.

By J. T. GREY, Deputy Marshal.

[ENDORSED:] Filed on return this 15th day of August, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*.

*The President of the United States of America to Captain Smith, Master of the Steamship Oceanic, greeting:*

You are hereby commanded that you have the body of Lau Ow Bew by you imprisoned and detained, as it is said, together with the time and cause of such

12 imprisonment and detention, by whatsoever name he shall be called or charged, before the Honorable the Circuit Court of the United States for the Northern District of California, at the Court room of said Court, in the city and county of San Francisco, California, on or before the 15th day of August, 1891, or in case the steamer on which said petitioner is detained has not cleared on that day, as soon as practicable after clearance, but before the departure of the steamer, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

In obedience to the within writ, I hereby produce the body of Lau Ow Bew, as within directed, and
13 return that I hold him in my custody by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act.

G. LOSSINS, For Captain Steamship Oceanic.

San Francisco, 14-8, 1891.

[ENDORSED:] Filed on return this 15th day of August, 1891.

L. S. B. SAWYER, Clerk.

**United States Circuit Court, Northern District of California.**

*In re* LAU OW BEW on *Habeas Corpus*. No. 11415.

*To the Honorable Lorenzo Sawyer, Judge:*

And now comes Charles A. Garter, United
14 States Attorney for the Northern District of California, and asks for leave to intervene for and behalf of the United States, in the matter of the application made on behalf of the person first above mentioned, for a writ of *habeas corpus*, and respectfully makes opposition to the said writ, and for grounds of intervention states as follows: That as he is informed and believes, the said person in whose behalf said application was made, has been and now is lawfully detained by the master of the Steamship *Oceanic* now in the Port of San Francisco, Northern District of California, in compliance with the provisions of an Act of Congress of

the United States, entitled "An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, and the Act amendatory thereof, approved July 5, 1884, for the following reasons :

First. That the said person, in whose behalf
15 said application was made, is by race, language, color, and dress a Chinese person.

Second. That the said person, in whose behalf said application was made, arrived at the Port of San Francisco as a passenger on said vessel from Hong Kong, a foreign port or place in the Empire of China, and has failed to produce to the Collector of Customs for the Port of San Francisco, California, or to any other officer authorized by law, the certificate of identification by said Acts of Congress required.

Third. Intervenor denies, upon information and belief, that the said person, in whose behalf said application was made, is entitled to land in the United States, as is alleged in said application, or otherwise.

Wherefore, the said United States Attorney asks that a judgment and order of this Honorable Court be made and entered in accordance with the allegations herein contained, and directing that the said person first above mentioned be detained on board of said vessel until released, as provided by law or otherwise, to be returned to the country from whence he came, and that
16 such further order be made as to the court may seem proper and legal in the premises.

CHAS. A. GARTER, United States Attorney.

[ENDORSED:] Filed Aug. 15, 1891.

L. S. B. SAWYER, Clerk.

**United States Circuit Court, Northern District of California.**

*In re* LAU OW BEW on *Habeas Corpus.*

*Traverse to Return.*

The petitioner herein, in answer to the return
17 of the master and the intervention filed herein on behalf of the United States, makes the following denials and allegations:

1st. That at the time of the granting of the writ herein the said Lau Ow Bew was imprisoned, detained, confined and restrained of his liberty on the Steamship *Oceanic*, by Captain Smith, Master of the Steamship *Oceanic*, in the city and county of San Franscico, State of California, Northern District of California.

That the said imprisonment, detention, confinement and restraint was illegal, and the illegality thereof consisted in this, to wit:

That it was claimed by the said master, that said passenger is a subject of the Emperor of China, and should not be allowed to land under the provisions of section 6, of the Act of Congress of May 6th, 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese," as amended by the Act of
18 July 5th, 1884.

That the said passenger does not come within the restrictions of said Acts, but on the contrary, your petitioner alleges

2nd. That the said Lau Ow Bew is now on board the Steamship *Oceanic*, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof;

3d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein;

4th. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.;

5th. That the said firm is worth $40,000.00 and said passenger has a one-fourth interest therein in addition to other properties;

19 6th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports;

7th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the Steamship *Oceanic* on the 11th day of August, A. D. 1891;

8th. That at the time of his departure, he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to per-

20 mit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese Government, mentioned in section 6 of the Chinese Restriction Act of May 6th, 1882, as amended by the act of July 5th, 1884;

9th. That the reason the said passenger failed to procure said certificate so required as aforesaid by the said section 6 of the said Act is that the Chinese Government could not issue said certificate because they could not ascertain as required by said law the nature and character of the business carried on by said peti-

tioner, where and how long carried on, and the estimated value thereof, nor could the United States Consul vise said certificate as required by law because he could not ascertain the truth of the facts which be set forth therein.

LOU CHUNG, Petitioner.

21 Subscribed and sworn to before me this 24th day of August, A. D. 1891.

[SEAL.] R. M. EDWARDS, Notary Public.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 24th day of August, 1891.

W. G. WITTER, Asst. U. S. Atty.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11415.

This matter having been regularly brought on for hearing before the Court and Judge thereof, the United States Attorney having appeared and intervened
22 on behalf of the United States, and the same having been duly heard and submitted and due consideration thereon had, it is by the court now here considered:

That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty as therein alleged.

It is further adjudged and found that he came from China by the steamship *Oceanic*, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein:

It is therefore ordered that the said Lau Ow Bew be remanded by the United States Marshal for the Northern

District of California to the custody whence he was taken, to wit, on board the said steamship to the custody of the master of said steamship, or in case of a change of master, to the custody of the master thereof,
23 whoever he may be at the time of this order of remand, or to place him in the hands and charge of any party on board said steamship for the time being representing the master or then in charge of said steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship, whether still in port, not having departed therefrom, or having departed and retnrned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason the said Lau Ow Bew can not be placed on said steamship, that the said Marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came.
And for the purpose of carrying this order into
24 effect, it is further ordered that the said Marshal take the said Lau Ow Bew into custody and him safely keep till said order shall be fully executed.

Entered this 14th day of September, 1891.

L. S. B. SAWYER, Clerk.

I, L. S. B. Sawyer, clerk of the Circuit Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment of Remand, entered in said Court in the within entitled matter.

Attest my hand and seal of said Circuit Court this 14th day of September, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

[ENDORSED:] Filed September 14, 1891.

L. S. B. SAWYER, Clerk.

I, L. S. B. Sawyer, clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the therein entitled matter.

Attest my hand and the seal of said Circuit Court this 14th day of September, 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

[ENDORSED:] Judgment Roll filed September 14, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States for the Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*.

*Statement of Facts.*

It is hereby stipulated and agreed that the following are the facts herein:

1st. That the said Lau Ow Bew is now on board the SS. *Oceanic*, which arrived in the port of San Franciso, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

5th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money, amounting to many thousands of dollars, as duties upon imports.

6th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship *Oceanic* on the 11th day of August, A. D. 1891.

7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese Government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884.

28

CHARLES A. GARTER, U. S. District Attorney.
HARVEY S. BROWN and THOS. D. RIORDAN,
Attys. for Petitioner.

[ENDORSED]: Filed August 15, 1891.
L. S. B. SAWYER, Clerk.

29

**In the U. S. Circuit Court for the Northern District of California.**

*In re* LAU OW BEW. September 14, 1891.

*Chinese Restriction Act. Merchant's Certificate of Identity.*—Under the act of Congress of 1882, as amended by that of July 5, 1884, providing that

Chinese persons other than laborers, who are about coming to this country, must procure from the Government which they are about leaving a certificate of their occupation; all Chinese merchants, whether coming for the first time or having before lived here and returning after a temporary absence, must, before they can be admitted, procure such certificate.

30 *Habeas Corpus.*

THOS. D. RIORDAN and HARVEY S. BROWN,
For Petitioner.

CHARLES A. GARTER, U. S. District Attorney,
for Respondent.

BEATTY, J.—The petitioner is a subject of the Emperor of China, whence he arrived at the port of San Francisco on the 11th day of August, 1891. The master of the vessel on which he came having refused to land him, a writ of *habeas corpus* was issued in his behalf, and in answer thereto it is alleged that the cause of his detention upon such vessel is, that he had not procured from the Government of China the certificate required by the Act of Congress. From an agreed statement of facts it appears that the petitioner for the past seventeen years has been a merchant and a member of a prominent Chinese mercantile firm of Portland, Or., where he has during that time resided. That on September 30, 1890, he went to China, intending shortly to return to this country and to his business, which he did on said 11th day of August, and without

31 procuring from the Chinese Government the certificate required by the Act named.

The only question for determination is, whether a Chinese person who, having been domiciled in this country as a merchant, and temporarily leaving it, can re-enter without such certificate. In consequence of the indefinite legislation and the incompatible adjudi-

ration by other courts upon this subject, it is not one of easy solution. To briefly review both may not be inopportune.

It was provided by the Treaty of 1868, between this country and that of China, that *all* Chinese subjects should be permitted freely to come and reside here, and by that of November 17, 1880, by Article I, that the United States might *regulate*, *limit*, or *suspend* the coming here of Chinese *laborers;* but it was expressly provided that *such limitations* and *suspensions* should

"apply only to Chinese who may come here as
32 "laborers, other classes not being included in the
"limitations." By Article II—That "Chinese * * * proceeding to the United States as teachers, "students, *merchants* * * * shall be allowed to go "and come of their own free will and accord, and shall "be accorded all the rights, privileges, immunities, and "exemptions which are accorded to the citizens and "subjects of the most favored nation;" and by Article III—That any Chinese then resident here shall be protected in the enjoyment of the same rights * * * enjoyed by citizens of the most favored nations.

As to all Chinese *merchants*, whether resident in the United States or China, it is evident they have, by these treaties, the right to come and go as they will, and if under them this Government can adopt regulations to govern such coming and going they must be such as are not inconsistent with the enjoyment of such right.

33 The Government has, however, adopted such regulations as is conceded it may, even in violation of its treaties, and it did provide by section 6, Act of May 6, 1882, 22 Stat., 60, "that in order *to the faithful execution of Article I and II of the treaty*" of 1880, "every Chinese person other than laborers * * * "*who shall be about to come* to the United States shall "be identified as so entitled * * * by the Chinese

"Government," a certificate shall be issued to him, stating, among other things, "*his place of residence in* "*China*, * * * such certificates shall be "*prima* "*facie evidence* of the facts" stated in it.

*In re* Low Yam Choo, 13 Fed., 605, decided September 5, 1882, it was held that Chinese merchants resident of other countries than China who were about to come here were not required to procure such certificate. In the course of the opinion it was stated that the object of requiring such certificate was to furnish the evidence

that the Chinese person desiring to come was not
34 a laborer; that to hold that its object was in any way to prevent Chinese merchants from coming

"would be to impute to Congress a purpose to disregard "the stipulations of the second article of the new treaty, "that they should be allowed to go and come of their "own free will and accord," and that the "Government "(Chinese) could not be expected to give in its certifi- "cate the particulars mentioned of persons resident— "some perhaps for many years out of its jurisdiction."

Following this decision said section 6 was so amended by Act of July 5, 1884, 25 Stats., 476, that every Chinese person other than a laborer, who is entitled "*and who* "*shall be about to come to the United States*," shall obtain the required certificate of the government of which he may then be a subject, and from which he is about to come. The certificate shall state * * * the former

and present occupation or profession, when and
35 where, and how long pursued, and place of residence. * * * If the person is a merchant, said certificate shall * * * state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application. The facts shall also be investigated by the representatives of the United States at such place, by whom such certificates shall be *vised*, and it is further provided that it

shall be *prima facie* evidence of the facts in it stated "*and shall be the sole evidence permissible on the part of the person*" asking to be admitted.

After the change in the law came the decision *in re* Ah Ping, by the learned Judge of this circuit, holding that a Chinese merchant who temporarily left this country could return without procuring such certificate.

Most forcibly was it argued that the Act did not
36 apply to those who had long been domiciled and transacting business here, but only to those merchants who were for the first time about to come to this country. That as to the latter class the government which they were about to leave would have the facts and *data* from which to make the required certificate, but as to the other class such foreign government, not knowing the facts, could not make the certificate.

It would seem almost impossible, at least it is impracticable, to literally enforce the Act without working injustice to those Chinese merchants who have so long resided here as to have lost their identity in China. On such returning to that country temporarily it can not be known there what their occupation is. It results that either that government must issue the certificate and our representatives then indorse it, without any knowledge of the facts or matters therein stated, or that the merchant, entitled under the laws and treaties to a residence here, is debarred from returning; while
37 the Chinese merchant who has never been here can readily procure the certificate and come. It can scarcely be that the law was designed in its operation to prevent the return of those merchants who had long resided here and admit those who had never been in the country, and yet such may be the frequent result if the letter of the law is followed. This seems a harsh interpretation of the Act, and one that may often operate as a violation of the absolute and distinct provisions of

the treaties, whereas both Acts of Congress referred to expressly declare their enactment is in pursuance of and to carry out such treaties.

In Chew Heong *v.* United States, 112 U. S., 536, a Chinese laborer who, by said treaty being entitled to a residence here, left here during the passage of the Act, and hence without procuring on leaving, the cer-
tificate required for laborers, and on his attempt
38 to return was refused a landing. While the law required all laborers who had lived here and had left and desired to re-enter to have such certificate, and provided that it should be the *only evidence of their right to return*, the Supreme Court held that it was absurd to maintain that those Chinese laborers who left when no certificate was required could not be admitted upon their return, after the passage of the Act, without one; and that the law should be consistently construed according to its spirit, and not letter, and in such way as to carry out the intent of Congress, which was to sustain the treaties, and not to violate them.

It should also be noted that the Treasury Department has generally construed the Act to permit the return, without such certificate, of merchants domiciled here who may have been temporarily absent.

If the foregoing authorities and rulings were the only guide I should not hesitate to adopt them as the law for
this case; but the Supreme Court, in the very
39 recent case of Wan Shing *vs.* The United States, has adopted a contrary view. In that case the petitioner claimed to have been a merchant in San Francisco, which place he left in 1882 for a temporary residence in China, and returned to San Francisco in 1889, without having procured, before leaving China, such certificate, which the Court held was essential to his admission. Against the force of this decision it is now urged that what is in it, which might affect this

case, is mere *obiter dictum;* that the only question involved was whether the testimony was sufficient to establish the petitioner's character as a merchant; and whether he could land without such certificate, was not an issue, and that in so far as this last question was decided, it was without consideration and more the result of inadvertence than of deliberation.

If such were the case, in view of the other rulings cited above, this last case might be considered as not a controlling one. The opinion says the refusal
40 to land the petitioner was based, not upon the Acts of 1882 and 1884, but upon that of 1888, which prohibits all Chinese laborers from now coming to the United States, and that "the petitioner, if a "laborer, could not have been permitted to land. * "* * *His right to land, therefore, rested upon his es-* "*tablishing the fact that he was not a laborer within the* "*provisions of the Act of October 1, 1888, and that could* "*only have been shown by a certificate of identity, issued* "*under the authority of the Chinese Government.*"

The opinion then proceeds to quote from said Section 6, enacted in 1882 and amended in 1884, especially as emphasizing the clause which directs that said certificate "*shall be the sole evidence permissible on the part* "*of the person so procuring the same to establish a right* "*of entry into the United States.*" It then declares: "This clause disposes of the case before us. No cer-
"tificate was presented by the petitioner, under
41 "the statute, showing that he was entitled to "enter the United States, *nor was any attempt* "*made to account for its absence.*" Had the decision concluded here this last clause would justify the view that such certificate is not always necessary, but when a sufficient reason appears for its absence, other evidence may be substituted. But it is further added: "The evidence offered to show that the petitioner was

"a merchant, was weak and unsatisfactory, *but the* "*statute itself does away with the necessity for any in-* "*vestigation by the Court as to its sufficiency, for it de-* "*clares that while the certificate may be contradicted by* "*the authorities of the United States*, and it is to be "taken by them only as *prima facie* evidence, *it shall* "*constitute the only evidence permissible on the part of* "*the person producing the same to establish his right to* "*enter the United States.*" And in the concluding clause of the opinion the Court reiterates the same view.

42

It is true the Court did not, at any great length, discuss the direct question involved here, nor did it refer to other adverse decisions and rulings, but it certainly has most deliberately and in unequivocal language decided that the certificate defined by the law is absolutely necessary to the admission of any Chinese merchant. There existed in that case two reasons through which the Court could have reached its conclusion that the petitioner was not entitled to land, without deciding the direct question that must determine this case. First, it clearly appears from the record which was before the Supreme Court that the evidence was insufficient to establish the petitioner's character as a merchant, and, second, it also appears from such record that he had lived but two years in this country and seven in China immediately prior to his attempt to return. It is quite evident that his long residence in China was sufficient not only for him to have established some business or to have engaged in some occupation there and to have abandoned what he had here; but also to have enabled the Chinese Government to acquire such knowledge of his status there as would enable it to make the required certificate.

It may be urged that in any case, when a resident merchant here departs to some other country, although

intending to return, if he remains so long in such foreign country as to give him a residence and for his occupation to become fully known there, the reason why he should procure such certificate is as apparent and important as in the case of one coming for the first time. The fact that the Supreme Court did not assign either of these reasons as the basis of its judgment, but rested it alone upon the provisions of the statute, argues that the Court meant what it deliberately and plainly said I can not, therefore, view as an *obiter dictum* what
44 appears the vital part of that decision.

Even if I entertained a contrary opinion its announcement would not be justified. It would be an unfortunate practice for the Bar, litigants, and the people, should an inferior Court declare opinions which it believed in conflict with those of the superior Court, and especially when the latter is the highest in the land, and, at least, the peer of any in the world. My only course is to follow the rulings of that Court as I understand them. If I misconstrue them, that, or some other appellate court can correct my error. There is, however, another view to be taken of this law. When a statute is so plain that doubt can not be entertained that the legislators intended it as it reads, courts should not attempt to attach to it another construction from that plainly intended; but only ambiguous and unconstitutional statutes they may construe and overturn.
45 When this last Act was adopted, Congress had become familiar with the Chinese question and the legislation concerning it, and must have foreseen the effect of this. Moreover, when a Chinese subject returns to China and remains there many years, he should be required, before returning here, to procure a certificate of his occupation there. Seeing the necessity of such a rule in such cases, and the difficulty of fixing any limit of residence in a foreign country which should make it

proper to secure such certificate, it seems probable that Congress intended the rule to become applicable to all coming here, whether for the first time or otherwise. At all events, the Supreme Court seems to have adopted this view and has left it to Congress to amend the law if it shall work hardship, as it undoubtedly may in cases like this. In accord, therefore, with what is deemed the ruling of that Court, it is now ordered that the writ be denied and the petitioner be remanded to the Empire of China.

(Signed:) BEATTY, Judge.

46 [ENDORSED:] Read in open court, Sept. 14, 1891.
L. S. B. SAWYER, Clerk.

At a stated term, to wit, the July term, A. D. 1891, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Northern District of California, held at the court room in the City and County of San Francisco on Monday, the 14th day of September, in the year of our Lord, one thousand eight hundred and ninety-one.

Present: The Honorable James H. Beatty, United States District Judge, District of Idaho.

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11,415.

47 This matter, heretofore submitted to the Court for consideration and decision upon an agreed statement of facts, having been duly considered, and the opinion of the Court having been read, it is ordered that Lau Ow Bew, the petitioner herein, be remanded to the custody whence he came, and judgment entered herein accordingly. It is further ordered that said petitioner be released from custody upon giving a bond in the sum of five hundred dollars.

It is further ordered that an appeal to the United

States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, allowed, and that a certified transcript of the record and of all proceedings be forthwith transmitted to said United States Circuit Court of Appeals.

On motion of Thomas D. Riordan, attorney for said petitioner, it is ordered that a stay of proceedings for five days be granted.

48 **United States Circuit Court, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11,415.

You will please take notice that the above-named Lau Ow Bew appeals to the Circuit Court of Appeals in and for the Ninth Judicial Circuit, from the order of remand and judgment made and entered herein by said Circuit Court on the 14th day of September, A. D. 1891, and from the whole and each and every part thereof.

Yours, &c.,

THOS. D. RIORDAN,
Attorney for Petitioner.

To Chas. A. Garter, Esq.,
U. S. Dist. Att'y and Clerk of said court.

49 [ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed Sept. 28, 1891.

L. S. B. SAWYER, Clerk.

**In the United States Circuit Court of Appeals for the Ninth Circuit.**

In the Matter of LAU OW BEW on *Habeas Corpus.*

Afterwards, to wit, on this first Monday in October in the same term, before the Judges of the Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the District of California,
50 comes the said Lau Ow Bew, appellant, by Harvey S. Brown and Thos. D. Riordan, his attorneys, and says that in this record aforesaid there is manifest error in this, to wit:

That the said Circuit Court of the Ninth Judicial Circuit, in and for the Northern District of California, erred in deciding:

1. That the appellant is not entitled to enter the United States.

2. That he is not unlawfully restrained of his liberty.

3. That the said appellant was required to produce the certificate required by section 6 of the Act known as the Chinese Restriction Act, passed May 6th, 1882, as amended July 5th, 1884.

4. That a Chinese merchant domiciled in the United States and departing therefrom temporarily with the intention of returning should, before being permitted to re-enter the United States, produce the certificate required by section 6 of the Act above referred to.

51 5. That he be remanded to the custody of the master of the steamship whence he was taken.

And the said Lau Ow Bew prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

HARVEY S. BROWN and
THOMAS D. RIORDAN,
Attorneys for Appellant.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER, Asst. U. S. Dist. Atty.

Filed Sept. 28, 1891.

L. S. B. SAWYER, Clerk.

52 UNITED STATES OF AMERICA, } ss.
*Northern District of California.* }

Be it remembered, that on this 14th day of September, 1891, before the undersigned, a commissioner duly appointed by the Circuit Court of the United States, Northern District of California, to take ackowledgment of bail and affidavits, etc., personally appeared Lau Ow Bew as principal, and Lou Chung, of the firm of Fook Wah & Co., No. 707 Dupont street, and Yee Lee, of the firm of Sun Quong Chong & Co., No. 710 Sacramento street, as sureties, and acknowledged themselves to owe and be indebted to the United States of America, as follows: that is to say, in the sum of five hundred dollars each, to be levied of their goods and chattels, lands and tenements, and the United States rendered, if default be made, in the conditions following:

53 The conditions of this recognizance are such, that whereas, the said Law Ow Bew has been produced before the Circuit Court of the United States, in and for the Northern District of California, upon a writ of *habeas corpus*, duly sued out of said Court upon petition, and has been duly admitted to bail by said court, pending the hearing of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of remand entered in said Circuit Court, in the sum of five hundred dollars.

Now, therefore, if the said Lau Ow Bew, shall personally appear before the said Circuit Court of the

United States, in and for the Northern District of California, at the court room thereof, at San Francisco, California, as he may from time to time be by said Court required to appear, and render himself amenable to any and all lawful orders and process of said
54 Court, and not depart the said Court without leave first obtained, and abide by the final order of said Court in said matter to be made and entered, and answer all costs in the premises, then this recognizance shall be void; otherwise to remain in full effect and virtue.

Chinese.
LAU X OW BEW. [SEAL.]
Signature.
Chinese.
LOU X CHUNG. [SEAL.]
Signature.
Chinese.
YEE X LEE. [SEAL.]
Signature.

Acknowledged before me, the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

55 UNITED STATES OF AMERICA, } ss:
*Northern District of California.* }

Lou Chung and Yee Lee, being duly sworn, each for himself, deposes and says, that he is a householder in said District, and is worth the sum of fifteen hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Chinese
LOU X CHUNG.
Signature.
Chinese
YEE X LEE.
Signature.

Sworn to before me this 14th day of September, A. D. 1891.

F. D. MONCKTON,
56 Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA, } ss:
*Northern District of California.* }

Lou Chung and Yee Lee, being duly sworn, each for himself, deposes and says, that his business and place of business are truly stated in the within bond, and that he resides in and owns property in the city and county of San Francisco, State of California, as follows:

Lou Chung, residence No. 707 Dupont street, owns $10,000 interest in the firm of Fook Wah & Co.

Yee Lee, residence No. 710 Sacramento street, owns $1,500 interest in the firm of Sun Quong Chong & Co.

Chinese
57 LOU X CHUNG.
Signature.
Chinese
YEE X LEE.
Signature.

Subscribed and sworn to before me, this 14th day of September, 1891.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

I hereby certify that I personally know each of the persons named in and who signed the within bond as sureties; that the name therein set forth and signed by him is the name by which he is generally known; that he is connected with the firm therein named as therein stated, and that I believe him to be amply worth the penalty thereof exclusive of property exempt
58 from execution, and over and above all his just debts and liabilities.

THOS. D. RIORDAN,
Attorney for Petitioner.

The form of the within bond and the sufficiency of the sureties thereon are approved.

HAWLEY, Judge.

W. G. WITTER, Assistant U. S. Attorney.

[ENDORSED:] Filed, September 28, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.**

59

In the matter of LAU OW BEW on *Habeas Corpus*.

No. 11415.

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written and printed pages, numbered from 1 to 20 inclusive, to be a full, true, and correct copy of the record and all proceedings in the above and therein entitled matter, and that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 3d day of October, A. D. 1891.

60 [SEAL.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA—*ss:*

*To the United States of America and to the Hon. Charles A. Garter, United States District Attorney for the Northern District of California, greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit to be held at the city of San Francisco, State of California, on the 5th day
61 of October, A. D. 1891, pursuant to an order of the Circuit Court of the United States, Ninth Circuit Northern District of California, made and entered on the 14th day of September, A. D. 1891, allowing an appeal from the judgment and order of remand rendered and entered herein on said day in the matter of Lau Ow Bew on *habeas corpus*, wherein the said Lau Ow Bew is plaintiff in error and you are defendant in error, to show cause, if any there be, why the errors in the said *habeas corpus* proceeding mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas P. Hawley, U. S. District Judge for the District of Nevada, assigned to hold and holding U. S. Circuit Court for the Northern District of California, this 28th day of September, A. D. 1891, and of the Independence of the United
62 States the one hundred and sixteenth.

THOMAS P. HAWLEY, Judge.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed Sept. 28, A. D. 1891.

L. S. B. SAWYER, Clerk.

63 [ENDORSED:] Service of a copy of the within transcript is hereby admitted this 3d day of October, A. D. 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed October 3d, 1891.

F. D. MONCKTON, Clerk.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of the printed transcript of the record in the cause entitled Lau Ow Bew, appellant, *vs.* The United States of America, appellee, No. 12, as the original thereof remains of record in my office.

Attest my hand and seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON, Clerk.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Respondent. } No. 12.

BY THE COURT:

It is conceded by counsel for the appellant that in the case of Wan Shing *v.* United States, 140 U. S., 424, the Supreme Court decided the point involved in the present appeal adversely to the appellant. Nevertheless we are asked, by virtue of the sixth section of the Act creating this Court, to certify the case to the Supreme Court for instructions upon the ground, as is claimed, that that Court might have decided the case of Wan Shing *v.* United States the same way for other reasons than those assigned as the basis of the decision, and because in that case the attention of the Court was not called to certain provisions of the Act of Congress, the consideration of which, it is claimed, would have wrought a different result. There is nothing in the opinion of the court to indicate that its attention was not called to the clauses of the Act referred to. The

precise point was decided, and we are bound to presume that every provision of the law bearing upon the subject was considered by the Court. We can not put ourselves in the attitude of asking instructions upon a point already decided. If, as is contended on the part of the appellant, the case of Wan Shing *v.* United States was not fully presented to the court, and if, as is said, the Treasury Department of the Government in enforcing the provisions of the Act of Congress involved in Wan Shing's case, is giving it a different construction from that given by the Court, whose province it is to construe and declare its meaning, under the belief that the Court did not really intend to decide what it did decide, or if, for any cause, the Supreme Court may wish to reconsider the question, an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this Court there is nothing to do but to affirm the judgment on the authority of the case cited, and it is ordered accordingly.

[ENDORSED:] Read in open court, and filed October 7, 1891.

F. D. MONCKTON,
*Clerk.*

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of an opinion this day read in open court and filed in the cause entitled Lau Ow Bew, appellant, *v.* The United States of America, appellees, No. 12, in said Circuit Court of Appeals.

Attest my hand and seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*

AT A STATED TERM, to wit, the October term, A. D. 1891, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room in the city and county of San Francisco, on Wednesday, the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable E. M. Ross, United States District Judge for the Southern District of California; Honorable Thomas P. Hawley, United States District Judge for the District of Nevada.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Appellees. } No. 12.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the said Circuit Court of the United States for the Northern District of California, and was argued by counsel, and the same having been duly considered, and the opinion of the Court having been read in open Court and filed with the clerk, it is ordered that the judgment of the said Circuit Court be, and the same hereby is, affirmed, and the cause remanded to said Circuit Court at the cost of the appellant.

On motion of Thomas D. Riordan, Esq., counsel for the appellant, it is ordered that a stay of proceedings herein be, and the same hereby is, granted for and during the space of thirty days.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within entitled cause.

Attest my hand and the seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*

[ENDORSED:] No. 12. U. S. Circuit Court of Appeals for the Ninth Circuit. Lau Ow Bew, appellant, *vs.* The United States. Certified copy of order.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

No. 12, October term, 1891.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Appellee. } Judgment.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the said Circuit Court of the United States, for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same hereby is affirmed, and the cause remanded to the said Circuit Court, at the cost of the appellant.

Judgment entered this 7th day of October, 1891.

F. D. MONCKTON,
*Clerk.*

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of an original judgment this day entered in the above entitled cause and that the same, together with the certified copy of the transcript of record, the brief of appellant, the opinion of the court, and the order of court hereto annexed, constitute a complete copy of the record in said cause.

Attest my hand and seal of said Circuit Court of Appeals, this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*

Supreme Court of the United States, October Term, 1891.

LAU OW BEW, Petitioner,
*vs.*
THE UNITED STATES. } No. 1458.

It is hereby stipulated and agreed by and between the petitioner and the United States that the issuing of a writ of certiorari to the United States circuit court of appeals for the ninth circuit, under the order of the Supreme Court of the United States, upon the petition in the above-entitled matter, made and entered on the sixteenth day of November, 1891, be, and the same is hereby, waived, and that the Supreme Court of the United States may review and determine the case of Lau Ow Bew, appellant, *versus* The United States, appellee, No. 12, in the said circuit court of appeals, mentioned in the said petition, upon the certified copy of the record of the said court in the said case furnished and filed herein with the said petition, which copy of the said record shall and may be taken to be a complete copy of the record and proceedings of the said circuit court of appeals in the said case, and shall have the same effect for the purpose of the Supreme Court of the United States in reviewing and determining the said case as if the same had been duly returned by the said circuit court of appeals upon and in obedience to a writ of certiorari issued by the Supreme Court of the United States and directed to the said circuit court of appeals under and in pursuance of the said order.

It is hereby further stipulated and agreed by and between the said parties that the clerk of the Supreme Court of the United States may omit from the printed record the brief of the appellant filed in the said circuit court of appeals

and certified by the clerk of the said court with the copy of the record in the said case.

Dated Washington, November 21, 1891.

LA OW BEW,
By J. HUBLEY ASHTON &
THOMAS D. RIORDAN,
*His Attorneys and Counsel.*
A. X. PARKER,
*Assistant Attorney General.*

[Endorsed:] 14932. Sup. Court U. S., Oct'r term, 1891. No. 1458. Lau Ow Bew, app't, *vs.* The United States. Stipulation waiving issuance of writ of certiorari & as to record. Filed Nov. 16, 1891.

(Endorsed on cover:) Case No. 14932. Court of appeals, 9th circuit. No. 1458. Lau Ow Bew, appellant, *vs.* The United States. Filed November 16, 1891.

Office Supreme Court U. S.
FILED
NOV 2 1891
JAMES H. MCKENNEY,
CLERK.

# *CIRCUIT COURT, DISTRICT OF CALIFORNIA.*

## IN RE AH PING.

*March 30, 1885.*

CHINESE RESTRICTION ACTS—MERCHANT TEMPORARILY DEPARTING.—A Chinese merchant, residing and doing business in the United States, who temporarily departed therefrom before the passage of the Chinese restriction act, is entitled to re-enter the same without producing the certificate required by section six of the act of 1882, as amended in 1884.

THE SAME—RESTRICTION ACTS HOW CONSTRUED.—The acts of congress commonly called the Chinese restriction acts, should be construed, if possible, as not to bring them into conflict with stipulations in the treaties between the United States and China.

BEFORE SAWYER, CIRCUIT JUDGE and SABIN, DISTRICT JUDGE.

*Thos. D. Riordan*, for the petitioner.
*S. G. Hilborn*, United States Attorney, *contra*.

BY THE COURT, SAWYER, CIRCUIT JUDGE. This is an appeal from the District Court.

The petitioner is a Chinese subject of the Mongolian race, a merchant, not a Chinese laborer, and a member of the old and well-known firm of Hop Sing & Co., doing a mercantile business in the city and county of San Francisco, of which firm he has been a member since 1877. He resided in the United States, continuously, for the period of eight years, prior to his temporary visit to China. In 1879, he departed from California, for the purpose of visiting China, and returned to the United States on November 30, 1881, before the passage of the original Chinese restriction act. He remained at San Francisco from the last named date, attending to the business of his said firm, until February 1, 1882, when he departed for Victoria, British Columbia, to, temporarily, attend to the business of the firm, which has a branch house at that place. On July 19, 1884, after the passage of the Chinese restriction act, he departed from Victoria, and arrived at the port of San Francisco, by sea, July 23, 1884. He did not produce any certificate, of the kind required by section 6 of the restriction act, as amended in 1884, or as required by the act of 1882. The question upon this state of facts

is, whether said Ah Ping is entitled to land? Or whether the sixth section of the restriction act, as amended by the act of 1884, is applicable to a Chinese merchant, one of a firm residing, and doing their principal business in the United States, who, temporarily, departed therefrom before the passage of said act, to attend to a branch of the firm's business in British Columbia, and who returned to the United States after the passage of the act? I have never had occasion before to consider this precise question. Although it may be possible, it would be impracticable for the petitioner to go to China, and obtain the certificate required by that section, and, if the provisions of the section are applicable, no other evidence is admissible. If section six is applicable, then the petitioner is not, otherwise he is, entitled to land.

The question at issue depends upon a construction of the clause of section 6: '*Every Chinese person*, other than a laborer, who may be entitled by said treaty or this act, *to come* within the United States, and who shall be *about to come* to the United States,' shall obtain the permission of and be identified as so entitled in the mode provided. This with the clause in the same section, making the certificate the sole evidence as to those to whom it is applicable, is the only provision, either in the treaties in force or the act, putting any limitation upon the right of a Chinese merchant to come and go of his own free will, without any limitation or legal obstruction. The only equivocal words in the clause, taken literally would seem to be, 'who shall be about to come to the United States.' Does this phrase mean persons residing, or domiciled abroad, who leave their residence, or domicile, 'to come to the United States' either for travel or pleasure, or to take up their residence here, or for other purposes; or does it, also, include Chinese subjects already domiciled in the United States having their residence and business here, and who left the country temporarily, before, or who shall leave it after the passage of the act, for temporary purposes, with the intention of returning after the accomplishment of such purposes, to their residence in the United States? We are satisfied, upon the rules of construction and principles established by the Supreme Court of the United States, in Chew Heong *v.* United States (112 U. S., 536), de-

cided at the present term of the Court that this provision should be so construed as not to embrace the latter class. To give the section any other construction, would be to bring the act into direct conflict with the treaty, which the Supreme Court says should not be done, if such a construction can be avoided. The object of the act is, undoubtedly to prevent the increase in this country of the number of Chinese laborers, and this provision is designed to furnish means for readily identifying parties entitled to enter the United States.

As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand. Hence the provision. As to those resident, or domiciled in this country, we have ourselves the best means of identification; while, as to many of them even in their native country, and much less when they are temporarily in other foreign countries, there is no practical means of either identification, or for procuring the certificate prescribed.

The United States Statutes do not now, nor, have they ever, required or provided for the issue of any certificates in this country to resident Chinese, other than laborers, who are about to depart, temporarily for business or pleasure either to China, or other foreign countries. There are many Chinese merchants in California, who have been domiciled in the State from twenty to thirty-five years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return.

The treaty between the United States and China of 1868, commonly called the Burlingame Treaty, guarantees to Chinese subjects the right without any conditions or restrictions to come, remain in, and leave the United States, and to enjoy all the privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nation (16 Stat., 740). The treaty of November 17, 1880, puts no limitation upon this right, and does not authorize, expressly or by implication, any legislation of Congress putting any limitation upon the

rights of Chinese other than 'Chinese laborers.' The language of the treaty is: 'The limitation or suspension shall be reasonable, and shall apply *only* to Chinese who may *go* to the *United States as laborers, other classes not being included in the limitations.*' (22 R. S., 826.) On the contrary, articles two and three of the latest treaty in express terms guarantees that all Chinese of any class 'now either permanently or temporarily residing in the territory of the United States shall be secured the same rights, privileges, immunities, and exemptions as are enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by the treaty.' There is nothing, therefore, in any of the treaties that, expressly or by implication, authorizes Congress to put any restriction upon the right to come and go of such parties, while in other respects they are expressly placed upon the footing of all other most favored foreigners. If, then, there is anything in the restriction act that puts a limit upon these rights, such limitation is a direct violation of the express provisions of the several treaties with China now in force. While such a provision in an act of Congress would undoubtedly repeal the conflicting provisions of the treaties, as we have always heretofore held, yet, under the late decision of the Supreme Court, courts should, if possible, so construe the act of Congress as not to bring it into conflict with treaty stipulations. Upon the principles established in the case cited, we are satisfied that the act can be fairly construed so as not to include this case. Section one provides, in explicit terms, the literal meaning of which can not well be misunderstood, that 'during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain in the United States.' And section two makes it an offense for the master of any vessel to 'knowingly bring within the United States on such vessel and land, or attempt to land, or permit to be landed *any Chinese laborer* from any foreign port or place.' This language without the limitation put upon it by the provisions of section three, that it shall not apply to persons within the United States at the date of the treaty, is as broad and specific as it is possible to be, and literally construed included every individual laborer of the Chinese race. Yet the Supreme Court, after quot-

ing those provisions of sections one and two, explicitly says in substance that if they *had stood alone, without the limiting clause of section three*, its construction of the act would be the same as it is now. The exact language of the court, speaking through Mr. Justice Harlan, is: '*If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes would hold that they did not apply to Chinese laborers, who, by their residence in the United States, at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities, and exemptions as were accorded here to citizens and subjects of the most favored nation.* For since the purpose avowed in the act, was, to faithfully execute the treaty, any interpretation of its provisions would be rejected, which imputes to Congress an intention to disregard the plighted faith of the government, and consequently the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said in the case supposed would be that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure.'

This language, it is true, goes farther than was absolutely necessary under the facts of that case; but it is the deliberate statement that the court would have so held had the facts required it. Such a deliberate announcement made, under the circumstances of the case, we cannot regard as a mere dictum or the expression of the individual opinion of the judge delivering the judgment. We look upon it as binding upon this court as a rule of decision. The court simply applies the universally recognized rule, that the repeal of a statute or treaty by implication is not favored. In this case, the clause of section 6, under consideration, is less specific, as the words, 'who shall be about to come into the United States,' are more ambiguous, and are fairly open to the construction upon the language itself, in

view of the surrounding circumstances, that they are only applicable to those coming for the first time, or to persons having no present domicile or residence in the United States, but having their actual residence or domicile in a foreign country about to come into the United States, either on business, for travel, or as temporary or permanent residents.

At the time the petitioner left his residence in San Francisco for British Columbia on the business of his firm, both under the treaties and under the laws of the United States, then in force, he had a legal right to return without any conditions or restrictions, not applicable to subjects of any other, or 'the most favored nation.' He had no reason to anticipate any change of the law. At his departure he had a vested right under the treaties and laws then in full force to return. He had a right to rely on the laws as they then were. If, by the act in question, it was intended to cut off this right of return, then it was the deliberate intention of Congress to violate the treaty and cut off a right vested in the petitioner, both by the treaties and other laws of the land. As we have seen the act must, if possible, be so construed as not to work this wrong. The Supreme Court, in support of the construction given to the act in the case cited, further observes: 'To these (reasons) may be added the further one, that courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature.' To give the construction insisted on by the United States Attorney would be to give the act a retrospective operation, which would injuriously affect the right of the petitioner to return, vested under the treaties and laws in force at the time of his departure for temporary purposes to British Columbia. And as we have seen, there is less ground for holding that the petitioner is included within the purview of the act, than in the case decided by the Supreme Court, upon the hypothesis assumed in the paragraphs quoted from the decision.

The following language of the Supreme Court in

Chew Heong's case is equally applicable to the petitioner in this case: 'It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, other than a laborer who may be entitled by said treaty and this act to come within the United States,' *but fails to provide the means for the return and identification of Chinese laborers, who were entitled by the treaty to return, but who were out of the country when the act of Congress was passed.* But this argument, like the one just alluded to, *only proves that Congress while making provision for the coming of persons, who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and consequently left them to stand upon their rights as secured by the treaty, and if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belong to the class entitled to go and come.*

With as good reason may it be said that Congress, while providing for the case of Chinese, other than laborers, domiciled in foreign countries, not residents of the United States, and having no vested right to return as present residents of the United States, temporarily absent on business or pleasure, "who shall be about to come to the United States, omitted to make any special provision in reference to Chinese residents of the United States, temporarily absent with a right to return at the date of the passage of the act or who after the passage of the act temporarily leave the United States for foreign countries on business or pleasure, 'and consequently left them them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belong to the class entitled to go and come.'

If we have interpreted the principles established by the Supreme Court aright, the result is that section six of the restriction act is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return before the passage of the amendatory restriction act, having a right to return at the time of

their departure, and, who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure, since the passage of the act. This is the construction acted upon by the executive department of the government, and, we think, is fully justified in these particulars by the decision of the Supreme Court.

It results that the judgment of the district court must be reversed, and the petitioner discharged.

It is but just to say, that the judgment of the district court was rendered before the receipt here of the decision of the supreme court in Chew Heong's case. If there are any expressions in any of my former opinions, apparently inconsistent with the views here adopted, they are in opinions rendered before the decision of the supreme court in the case cited, and they had special reference to the facts in the case decided, and no reference to the point now involved.

Let the judgment of the district court be reversed, and the petitioner discharged.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

October Term, 1891.

No. 1458.

**LAU OW BEW, Appellant,**

*vs.*

**THE UNITED STATES.**

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

# BRIEF FOR APPELLANT.

J. HUBLEY ASHTON,
THOMAS D. RIORDAN,
Of Counsel for Appellant.

Press of McGILL & WALLACE, Washington, D. C.

# Supreme Court of the United States.

OCTOBER TERM, 1891.—NO. 1458

LAU OW BEW, *Appellant*,

*vs.*

THE UNITED STATES.

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

## BRIEF FOR THE APPELLANT.

This is a writ of *certiorari* for the review of the judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the Circuit Court of the United States for the Northern District of California, in a case of *habeas corpus*, which determined that Lau Ow Bew, the appellant, is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein, and ordered that he be deported out of the country, and transported to the port in China whence he came (Record, pp. 10, 11).

The appellant arrived at the port of San Francisco, on board of the Steamship *Oceanic*, from Hong Kong, on the 11th of August, 1891.

The Collector of the Port refused to permit him to land, and he was consequently detained in custody on board of the vessel, upon the "sole ground that he failed

and neglected to produce the certificate of the Chinese Government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884." (Record, p. 12, fol. 28.)

The Master of the steamship, in obedience to a writ of *habeas corpus*, sued out on behalf of the appellant, on August 14, 1891, produced his body before the Circuit Court of the United States for the Northern District of California on the next day, and made return to the writ that he held the appellant in his "custody by direction of the customs authorities of the Port of San Francisco, California, under the provisions of the Chinese Restriction Act." (Record, p. 6, fol. 130.)

The United States Attorney thereupon filed, by leave of the Court, an intervention on behalf of the United States, claiming that the appellant was lawfully detained by the Master of the steamship *Oceanic* in compliance with the provisions of the Act of Congress, entitled "*An Act to execute certain treaty stipulations relating to Chinese*," approved May 6, 1882, and the Act amendatory thereof, approved July 5, 1884, upon the ground that appellant was a Chinese person, who arrived at San Francisco, as a passenger on the steamship, from Hong Kong, and failed to produce to the Collector, or any other officer authorized by law, the certificate of identification alleged to be required by those Acts, and denying that he is entitled to land in the United States, as alleged in his petition for a writ of *habeas corpus*. (Record, pp. 6, 7.)

The appellant filed a traverse, or answer, to the return of the Master of the steamship, and the intervention on behalf of the United States, in which he denied that he came within the restrictions of the Act of May 6, 1882, as amended by the Act of July 5, 1884, and alleged certain facts showing that he is, and has been for seventeen years, a merchant domiciled in the United

States, and that he was on his way home after a short visit to his relatives in China, when he was refused permission to land at San Francisco (Record, pp. 8, 9, 10).

The case was heard and determined by the Circuit Court upon an agreed statement of facts as follows:

"It is hereby stipulated and agreed that the following are the facts herein:

"1st. That the said Lan Ow Bew is now on board the SS. *Oceanic*, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

"2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

"4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"5th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports.

"6th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship *Oceanic* on the 11th day of August, A. D. 1891.

"7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884." (Record, p. 12.)

On September 14, 1891, the Circuit Court rendered a judgment, in the case, as follows:

"This matter having been regularly brought on for hearing before the court and the judge thereof, the United States attorney having appeared and intervened on behalf of the United States, and the same having been duly heard and submitted and due consideration thereon had, it is by the court now here considered—

"That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty as therein alleged.

"It is further adjudged and found that he came from China by the steamship *Oceanic*, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

"It is, therefore, ordered that the said Lau Ow Bew be remanded by the United States Marshal for the Northern District of California to the custody whence he was taken, to wit, on board the said steamship to the custody of the master of said steamship, or, in case of a change of master, to the custody of the master thereof, whoever he may be, at the time of this order of remand; or to place him in the hands and charge of any party on board said steamship for the time being, representing the master or then in charge of said steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship whether still in port, not having

departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason, the said Lau Ow Bew can not be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came. And for the purpose of carrying this order into effect it is further ordered that the said marshal shall take the said Lau Ow Bew into his custody and him safely keep till said order shall be fully executed." (Record, p. 10.)

An appeal was taken from this judgment to the Circuit Court of Appeals, sitting in San Francisco, and, on the 7th day of October, 1891, the judgment was by that Court in all things affirmed (Record, p. 33).

On the 16th of November, 1891, this Court, upon the application of the appellant, ordered that a writ of *certiorari* issue to the Circuit Court of Appeals, requiring it to certify the case up for the review and determination of this Court, under the fifth section of the Judiciary Act of March 3, 1891.

The parties have entered into a stipulation waiving the formal issuing of the writ ordered by the Court, and agreeing that the case may be reviewed and determined by it upon the certified copy of the record of the Circuit Court of Appeals which accompanied the application for the writ of *certiorari* (Record, p. 34).

SPECIFICATION OF THE ERRORS RELIED UPON.

I. The Court below erred in rendering the said judgment, in the case of *Lau Ow Bew, appellant*, v. *The United States*, affirming the said judgment of the Circuit Court of the United States for the Northern District of California.

II. The Court below erred in not rendering a judgment reversing the said judgment of the said Circuit Court, and in not remanding the case to that Court with instructions to enter a judgment discharging the appellant from custody.

III. The Court below erred in deciding that the appellant was not illegally restrained of his liberty, and is forbidden by law to land in the United States, and has no right to be or remain therein.

IV. The Court below erred in deciding that the appellant had no right to land in the United States, on his arrival at San Francisco, on his way to his home in Portland, Oregon, on August 11, 1891, without producing to the Collector of the Port a certificate of identity under the authority of the Chinese Government of the kind provided for in section 6 of the Chinese Restriction Act of May 6, 1882, c. 126, as amended by the Act of July 5, 1884, c. 220.

V. The Court below erred in deciding that the appellant should be remanded to the custody of the Master of the steamship whence he was taken.

## ARGUMENT FOR THE APPELLANT.

### FIRST POINT.

**The sole question presented by this record is, whether by the just construction and effect of the 6th section of the Chinese Restriction Act of May 6, 1882, as amended by that of July 6, 1884, a Chinese merchant, residing and domiciled in the United States, who left the country temporarily on a visit to China, with the intention of returning to his home in the United States as soon as possible, is required, on his return to the country, after such a visit, to produce such a certificate of identity as is mentioned in that section, as a condition of his being allowed to re-enter the United States.**

1. It appears by the agreed facts, that the appellant is a Chinese merchant, who came to this country about 1874, under the "Burlingame Treaty," concluded July 28, 1868; that he is, and has been for seventeen years, a resident of the United States and domiciled therein; and that during that period he has carried on a wholesale and importing mercantile business in Portland, Oregon, under the firm name of Hop Chong & Co.

On the 3d of July, 1890, the Treasury Department promulgated certain regulations relative to the re-entry of Chinese persons, one of which is as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by the existing laws or treaty from returning to the United States after visiting China or elsewhere. No certification or other papers, however, are issued by the department or by any of its subordinate officers to show that they are entitled to land in the United States, but it is suggested that such parties should, before leaving the United States, provide themselves with such proofs

of identity as may be deemed proper, showing they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

On September 30, 1890, the appellant went to China for the purpose of visiting his relatives, and with the intention of returning as soon as possible, having previously procured the proper evidence of his *status*, as a merchant here, under this regulation.

He took passage for home, at Hong Kong, on the *Oceanic*, which reached San Francisco on August 11, 1891.

Although it was admitted by the Collector that he was a merchant domiciled in the United States, he was refused admission to the country because he did not produce a Chinese certificate of identity under the 6th section of the Chinese Restriction Act.

2. It is thus shown that the appellant, when he went to China, during his visit to that country, and when he reached San Francisco, in August last, was a merchant domiciled in the United States, and he had the right, under the Treaties with China, and the public law of nations, to proceed to his home, in Portland, unless he had been effectually deprived of that right by the Chinese Restriction Act.

## SECOND POINT.

**The Restriction Act of May 6, 1882, and the amendatory Act of July 5, 1884, were directed against the immigration to the United States of Chinese laborers, and were not designed or intended to prohibit, or restrict, the coming of other classes of Chinese persons to this country.**

1. The fifth Article of the Treaty concluded July 28,

1868, between the United States and China, known as the "Burlingame Treaty," which, like all our other Treaties with China, was made upon the express solicitation of the Government of the United States, declares, that the high contracting parties "recognize the inherent and inalienable right of man to change his *home* and allegiance and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as *permanent residents*."

Article VI of that Treaty is as follows:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, and exemptions in respect to travel or *residence* as may there be enjoyed by the citizens or subjects of the most favored nation. And reciprocally, Chinese subjects visiting or *residing* in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or *residence* as may there be enjoyed by citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States" (16 Stats., p. 740).

The reason for the negotiation of the Supplementary Treaty, concluded November 17, 1880, is declared, in its preamble, as follows: "Whereas the Government of the United States, because of the constantly increasing immigration of Chinese *laborers* to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing Treaties which shall not be in direct contravention of their spirit."

Articles I and II of that Treaty are as follows:

"ARTICLE I. Whenever in the opinion of the Government of the United States the coming of Chinese *laborers* to the United States or their residence therein

affects, or threatens to affect, the interests of that country, or to endanger the good order of said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, *other classes not being included in the limitations*. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE 2. Chinese subjects, whether proceeding to the United States as teachers, students, *merchants*, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed TO GO AND COME OF THEIR OWN FREE WILL AND ACCORD, and shall be accorded all the rights, privileges, and immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The Act of May 6, 1882, entitled "An Act to *execute* certain treaty stipulations relating to the Chinese," (22 Stats., 58,) as originally passed, and as amended by the Act of July 5, 1884, (23 Stats., 115,) is printed in the margin of the opinion of the Court, delivered by Mr. Justice Harlan, in the leading case of *Chew Heong* v. *United States* (112 U. S., 543), and also with the opinion delivered for the Court by Mr. Justice Blatchford in the case of *United States* v. *Lung Ah Ling* (114 U. S., 627).

It is an historical, and an adjudicated, fact, that this legislation, framed in supposed conformity with the provisions of the Treaty of 1880, was aimed against the immigration of Chinese laborers—not the coming of

others to the United States. (Chew Heong *v.* United States, 112 U. S., 545; The Chinese Exclusion Case, 130 U. S., 597; In re Low Yam Chow, 13 Fed. Rep., 608.)

The preamble of the Act of 1882 is: "*Whereas*, in the opinion of the Government of the United States, the coming of Chinese *laborers* to the country endangers the good order of certain localities within the territories of the United States;" and the same preamble prefaces the amendatory Act of 1884.

The legislation was not designed, therefore, to prohibit, or restrict, the coming to the United States of Chinese merchants, or intended to violate their right "to go and come of their own free will and accord."

2. The 6th section of the Act of May 6, 1882, in conformity with the general object of the Act, as observed by Mr. Justice Field, was intended to prevent, by a prescribed mode of proof, the evasion of the prohibition against the coming of Chinese laborers, and not to prevent the coming to the United States of other classes of persons (In Re Low Yam Chow, 13 Fed. Rep., 609).

The learned Justice, in that case, further said:

"The certificate mentioned in this section was evidently designed to facilitate proof by Chinese other than *laborers*, coming from China, and desiring to enter the United States, that they are not within the prohibited class. It is not required as a means of restricting their coming. To hold that such was its object would be to impute to Congress a purpose to disregard the stipulation of the second article of the new Treaty, that they should be 'allowed *to go and come of their own free will and accord.*'"

There is nothing in the amendments made in the 6th section of the Act of 1882, by the Act of 1884, which changes the object of that section, as it originally stood, so clearly defined by Mr. Justice Field, or which affects

the question of the application of that section, as amended, to Chinese merchants, commorant in the United States, who desire to re-enter the country after limited absences, on business or pleasure, otherwise than favorably to the view here maintained that the section has no application to such Chinese persons.

The purpose of the amendments made in the 6th section, was to apply the section to Chinese persons of the exempt classes, who are subjects of countries other than China, and who desire to come to the United States, and to give effect to the prescribed certificate as the only evidence of the right to enter the country, on the part of the persons who, by that section, are required to procure and produce them.

The principal change, in that section, effected by the Act of 1884, was by the *last* clause which provides that the described certificate "shall be the sole evidence permissible on the part of *the person so producing the same* to establish a right of entry into the United States."

It is well understood that the only purpose of that provision was to overcome the effect of the decision of Judge Deady, of Oregon, in January, 1883, in the well-known case of *Ho King*, a Chinese actor, who sought to enter the United States, without a Chinese certificate under the 6th section of the Act of 1882, and he was allowed to do so upon *parol* proof of his occupation (14 Fed. Rep., 724).

The Court, in that case, held that the certificate provided for in section 6 of the Act of 1882, upon the proper construction of that section, was *not* the only competent evidence that a Chinese person was not a laborer, and therefore entitled to come to and reside within the United States, but that the fact might be shown by any other pertinent and convincing testimony.

This decision was followed by the various Courts upon the Pacific coast until the passage of the Act of 1884, which provided, as a rule of evidence, that the designated certificates should be the only permissible proof that the persons, required to produce them, were *not* laborers, and were entitled to enter the United States.

The rule of evidence, prescribed by the amendment, was not adopted as a means of excluding from the country Chinese other than laborers, or of restricting their coming to the United States, but it was established as the means of effectually preventing the violation or evasion of the prohibition against the coming of laborers.

## THIRD POINT.

**The 6th section of the amendatory Restriction Act of July 5, 1884, by its just construction, does not include or embrace, and was not intended to apply to, Chinese merchants domiciled in the United States, and visiting China, or other foreign country, for a limited or temporary purpose of business or pleasure, with the design of returning on its accomplishment, and does not oblige, or purport to require, such Chinese persons, on their return to this country, to produce any certificate of the sort described in that section, before they shall have the right to re-enter, and proceed to their homes in, the United States.**

1. The 6th section of the amendatory Act of 1884 is as follows:

"That in order *to the faithful execution of the provisions of this act*, every Chinese person, other than a *laborer*, who may be entitled by said treaty or this act to *come* within the United States, and who shall be *about to come* to the United States, shall obtain the *permission* of and be *identified* as so entitled by the Chinese Government, or of such other foreign Gov-

ernment of which at the time such Chinese person shall be a *subject*, in each case to be evidenced by a certificate, issued by such Government, which certificate shall be in the English language, and shall show such *permission*, with the name of the *permitted person* in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, *former and present occupation or profession, when and where and how long pursued, and* PLACE OF RESIDENCE *of the person to whom the certificate is issued*, and that he is *entitled by this act to come within the United States.* If the person so applying for a certificate shall be a *merchant* said certificate shall, in addition to above requirements, *state the nature, character and estimated value of the* BUSINESS *carried on by him prior to and at the time of his application as aforesaid:* Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of *travel for curiosity* it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representative of the United States in the foreign country from which said certificate issues or of the consular representative of the United States at the port or place from which the person named in the certificate is *about to depart;* and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.

Such certificate viséd as aforesaid shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part *of the person so producing the same* to establish a right of entry into the United States ; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

The proposition which we submit as clear beyond all just doubt, upon the construction of this section, in the light of the history and the object of the statute, is, that it applies *only* to Chinese persons, other than laborers, coming from China, or other foreign country, for the *first time*, or to Chinese persons, other than laborers, who have their actual residence, or domicile, in China, or other foreign country, and no present domicile, or residence, in the United States, and who desire to come to and enter the country, for purposes of business or curiosity, or as temporary or permanent residents.

In other words, the section does *not* apply to Chinese merchants already domiciled in the United States, who having left the country for temporary purposes, *animo revertendi*, seek to re-enter it after the accomplishment of such purposes, with the view of returning to their business and homes in the United States.

2. All general terms in statutes are to be *limited* to those persons and objects to which the legislature *intended* to apply them, and are to be so construed, if possible, as to avoid an unjust or an absurd conclusion.

U. S. *v.* Palmer, 3 Wh., 631;
U. S. *v.* Kirby, 5 Wall., 98;
Smythe *v.* Fiske, 23 Wall., 380;
*In Re* Low Yam Chow, 13 Fed. R., 610.
Brewer v. Blougher, 14 Pet, 196.
U. S. v. Freeman, 3 How, 565
Henderson v. Mayor of N. Y, 92 U. S, 268

It can not be supposed that Congress would require Chinese merchants, who had become domiciled inhabitants of this country, on their return from temporary absences abroad, to be identified here by certificates of any kind, issued under the authority of foreign governments, especially when *our own means of identifying them are greatly superior to those of any other country, even that of their nativity.*

By the general international law foreigners who have become domiciled in a country other than their own, have certain rights and duties which place them to some extent upon the same footing as the citizens of that country.

Vattel, Bk. 1, chap. XIX, § 213;
1 Phillimore, Int. Law, chap. XVIII;
2 Wharton, Int. Law Dig., § 198, p. 286.
Murray v. Charming Betsy, 2 Cranch, 120.

It must be presumed, therefore, that Congress intended to *except* from any general terms, in this statute, Chinese merchants who had ceased to reside in their own country, and who had taken up their abode, and are carrying on their commercial business, in and under the protection of the United States.

Any *general* language, in the Act, would have to be *limited*, therefore, in accordance with the fundamental canons of statutory construction, to such Chinese merchants as were subject *de facto* to the jurisdiction of China, or some other foreign power, and had not become identified with the business and commerce of the United States.

3. It is manifest from all the language and the whole structure of the 6th section of the Act of 1884, that it was the intention of its framers to embrace within its terms only Chinese persons of the exempt classes, domiciled or residing in China or other foreign country, who

should be "*about to come to the United States*," actually, or potentially, for the *first time*, and whose character, as merchants, or otherwise non-laborers, could be properly and appropriately certified to and attested by the authorities of the foreign jurisdiction from which they came.

(*a*) The use of the phrase, "and who shall be *about to come* to the United States," as descriptive of the situation and intention, or predicament, of the persons who were to obtain the described certificates of *permission* and *identity*, shows clearly that what was referred to was the *original* coming of Chinese of the exempt classes into the United States.

Chinese merchants, domiciled in the United States, who are in China only for temporary purposes of business or pleasure, *animo revertendi*, are not "*about to come* to the United States," when they leave China for home, in pursuance of their original intention, and they are not persons who would appropriately apply to the Chinese Government for "permission" to "come" to the United States.

Such Chinese persons had *already* "*come*" to the United States, and, in contemplation of law, were *in* the United States, during the period of their temporary absence abroad.

They can not be said to "come" to the United States, when they *return* to it as the country of their established residence and business.

Nor can it be supposed that it was contemplated by the framers of the Act, that such persons should ask the *permission* of a foreign Government to leave its jurisdiction, for the purpose of returning to their residence and business in this country.

(*b*) The particulars which the certificate is required

to contain, show that it was to be given to persons residing in China, or other foreign country, and who could, therefore, appropriately and properly apply to the Chinese or other foreign Government for its attestation as to those particulars.

The information called for by the prescribed certificate, is such as no Government could be expected to be able to furnish with regard to persons *not* residing and carrying on their occupations within its territory and jurisdiction.

It must be presumed, therefore, that Congress intended that the foreign certificate, mentioned in the Statute, should be procured only by persons of the Chinese race, residing in China, or other foreign country, and about to come for the first time into the United States for travel or business, or to take up their residence here, or for other purposes.

(*c*) A construction of this sixth section which made it apply to Chinese merchants, domiciled in this country, returning to it after temporary absences abroad, would involve the exaction of the *unreasonable* and *absurd* condition, as a condition precedent to their right to reenter the country, that a foreign Government shall certify to the United States facts in regard to the business of persons, residing in this country, which the foreign Government can not be supposed to know, and which are presumed to be known already to the Government of the United States, as the means of information are directly in its own hands.

For example, how could the Chinese Government be expected to certify to this Government that the present *appellant* has been engaged in the mercantile business, in the City of Portland, Oregon, for the period of seventeen years, and that the capital stock of his business is $40,000, and that he carries on a business annually of

$100,000; and how could the diplomatic representative of the United States, in China, ascertain the truth of such facts before viséing any certificate under the sixth section of the Restriction Act?

It can not be supposed, therefore, that Congress intended, by any general language in the Act, to exact such a requirement, or impose such a condition, in the case of returning Chinese merchants, domiciled in the United States, and the statute is to be so construed, if construction is necessary, as to exclude the case from its purview, in accordance with the rule recognized so often by this Court.

That rule is, that the Court should discard any construction of such an enactment which would lead to absurd consequences (Oates *v.* National Bank, 100 U. S., 244).

Mr. Justice Field expounded the rule in *United States* v. *Kirby* (7 Wall., 486), as follows:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It is always to be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like com-

mon sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

In *Carlisle* v. *United States* (16 Wall., 153), the Court adjudged, in conformity with this principle, that a person who had been pardoned by the President was relieved from the requirement of proving his loyalty in the case of his claim, in the Court of Claims, for the proceeds of his captured property, although the statute expressly required the claimant, in such a case, to prove that he had never given aid or comfort to the rebellion.

It was to be presumed, said the Court, that "claimants restored to their rights of property by the pardon of the President were not in contemplation of Congress in passing the Act, and were not intended to be embraced by the requirement in question."

These authorities were cited and applied by the Circuit Court for the Northern District of California in the case, above cited, of the Chinese merchant, *Low Yam Chow*, who having established himself at Panama, in the Republic of New Grenada, left that country for the United States after the passage of the Act of May 6, 1882, and sought to land in San Francisco without producing the certificate described in the 6th section of that Act.

Mr. Justice Field, in that case, (referring to the Chinese Government,) said: "That Government could not be expected to give, in its certificate, the particulars mentioned, of persons resident, some, perhaps, for many years, out of its jurisdiction; neither the letter nor the spirit of the Act calls for a construction imputing to Congress the exaction of a condition so unreasonable.

We repeat what we said in the case of *Ah Tie*, that all laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

(*d.*) The condition referred to is not only unreasonable, but its performance is practically *impossible* in the case of Chinese merchants, residing here, who may find it necessary to absent themselves, temporarily, from the country, in the prosecution of their business, or for social or other proper purposes, with the design of returning as soon as possible to the United States.

For that reason, it is to be still more decisively presumed, in any view of the mere letter of the enactment, that Congress never intended to annex such a condition to their right to re-enter the United States, upon their return from such absences, in conformity with the maxim cited by this Court, in the *Chew Heong* case, *lex non intendit aliquid impossibile* (112 U. S., 554).

If the terms of the 6th section of the statute were susceptible of a construction which would include such resident merchants, they should be held to be excluded from the purview and operation of the law, by the principle stated by the late Judge Sawyer, in the *Prior Resident Laborers' Case*, as follows:

"The necessity to produce a certificate and the right to have it in order that it may be produced are co-relative conditions. The one provision is the complement of the other. They are reciprocal and must go together. The obligation to produce the certificate presupposes the practicability or at least the possibility of procuring it in order that it may be produced. The two provisions go together and form but one legal conception. The obligation to produce and the right and ability to obtain it are dependent and not independent conditions. One is the counterpart of the other, and it is not to be supposed that Congress would have adopted one branch

of the proposition without the other, otherwise it would have distinctly done so in terms—if, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers, or if intended, it must be void."

*In re* Leong Yick Dew, 2 West Coast Rep., 83.

Many Chinese merchants, who have been domiciled in this country for many years, and who still remain subjects of China, have branch houses in Victoria, Honolulu, Mexico, and other countries, and are constantly going to and fro on temporary visits to those countries, for the purpose of making collections, and attending to their various interests in those branch houses.

It is evident that such persons would never be able, when thus absent, to procure from the Chinese Government such certificates as are described in the Restriction Act, if they should proceed to China, from those countries, and apply for the certificates before returning to the United States, as the Chinese Government could not and would not certify to facts touching such persons, occurring out of its territory and jurisdiction, and in regard to which it has no knowledge, or direct and authentic means of information.

## FOURTH POINT.

**The Court will construe the 6th section of the Act of 1884 so as to be in harmony with our Treaties with China, and the established principles of international law.**

1. The Court, speaking by Mr. Justice Harlan, in the leading case, *Chew Heong* v. *United States*, said :

"Since the purpose avowed in the Act was to faithfully execute the Treaty, an interpretation of its provisions would be rejected which imputed to Congress

an intention to disregard the plighted faith of the nation, and consequently the Court ought, if possible, to adopt that construction which recognizes and saves rights secured by the Treaty" (112 U. S., 549).

It was accordingly there declared that although the 1st and 2d sections of the Act of 1884, by their general terms, included every Chinese laborer, the Court was bound to construe them so as to exclude from their operation laborers who were within the United States at the date of the treaty of 1880, independently of the express limitation in the 3d section of the statute.

The Court, in that case, also, used the following language:

"The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. Aside from the duty imposed by the Constitution to respect treaty stipulations where they become the subject of judicial proceedings, the court can not be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry, whether the rights secured by such stipulations shall be recognized and protected; and it will be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt for a moment that this construction were possible in the mind of its members when the legislation in question was enacted." (Chew Heong v. United States, 112 U. S., 536.)

2. As Treaties contain the positive law of nations between the parties, their infraction is a violation of the *international law* by which their conduct should be governed (2 Phillmore Int. Law, chap. 2).

This Court, speaking by Chief Justice Marshall, in the case of *Murray* v. *Charming Betsey*, (2 Cr., 118), said: "An Act of Congress ought *never* to be construed to violate the law of nations, *if any other possible construction remains.*"

A citizen of the United States, domiciled abroad, was accordingly held, in that case, not to be included in the prohibition of the Act of 1800 suspending intercourse with France.

The principle was recognized as one of paramount force, in the construction of municipal legislation, by all the Judges of England in the great case of *The Queen* v. *Keyn* (Law Rep., 2 Ex. Div., 63).

It was applied by Lord Stowell in the celebrated case of *Le Louis* (2 Dod., 239), by Dr. Lushington in *The Annapolis* (2 Lush. Adm., 295), and Vice Chancellor Wood, and the Lords Justices, on appeal, in the case of *Cope* v. *Doherty* (1 K. & J., 367; 2 De G. & J., 614).

## FIFTH POINT.

**A construction of the 6th Section of the Restriction Act, which made it applicable to Chinese merchants, residing and doing business in the United States, who leave the country for temporary purposes, with the design of returning thereto, would constitute it a palpable violation of our Treaties with China, and the public law of nations.**

1. By our Treaties with China, and international law, Chinese merchants, domiciled in the United States, have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges, and immunities, enjoyed, in this country, by the subjects or citizens of the "most favored nation."

This aggregation of rights includes the right to reside, and carry on trade, in the country, acquire property, and enjoy the same privileges and receive the same protection in respect to their persons and property as our own citizens.

As Vattel has said:

"The sovereign ought not to grant an entrance into his state for the purpose of drawing *foreigners into a snare;* as soon as he admits them, he engages *to protect them as his own subjects, and to afford them perfect security, as far as depends on him.* Accordingly we see that every sovereign who has given an asylum to foreigners, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subjects." (Vattel, B'k II, chap. VIII, sec. 104.)

A municipal law of the United States which should in terms, or effect, prohibit or prevent Chinese merchants, residing and doing business in the country, from leaving it, for temporary purposes of business or pleasure, or from returning to and re-entering the country, after the accomplishment of such purposes, or restrict their right to so leave and return to the country, would be a direct violation of their rights under our Treaties with China, and under the public law of nations.

The right of free exit and entrance to the United States is essential to the proper enjoyment of their property and commercial interests here, and to take away or restrict that right is potentially to take away or impair the value of their property and business.

2. It is equally clear that a requirement of law which would oblige such merchants, whenever they departed from the country, under such circumstances, to produce certificates under the authority of the Chinese Government of the kind described in the 6th section of the Act of 1884, as a condition of their being allowed to re-enter the United States, would be practically equivalent and tantamount to an absolute *prohibition* against their return to the country, which is not only their home, but the seat and centre of their property and business.

It would operate against them as a sentence of *banishment* from the country.

It would be impossible, as has been said, for such Chinese merchants, many of whom have lived for a generation out of China, to obtain, during their temporary journeyings abroad, the described certificates of identity from the Chinese Government which can not be presumed to know, and which, indeed, is presumed not to know, the facts connected with their business and property in this foreign land.

It is to be conclusively presumed that no self-respecting Government, like that of China, would undertake to pledge its sovereign word of honor in respect to matters of fact relating to the private business and property of persons who have removed themselves from its jurisdiction, and established their domicile in the territory of a foreign power.

3. A construction of the 6th section of the Act of 1884, therefore, which should make the right of these merchants to re-enter the United States, after such temporary absences abroad, to depend upon their producing such foreign documents as are mentioned in that section, would render the enactment a direct violation of our Treaties with China, and the rights secured to them by those Treaties, as well as by the public law of nations.

4. This consideration alone would be sufficient to justify the Court in giving a construction to that section, in harmony with the Treaties, which would exclude such Chinese persons from its operation, even were the terms used in the statute susceptible of a larger meaning than can properly be assigned to them.

## SIXTH POINT.

**The 6th section of the Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884, has been uniformly construed and applied conformably to the views here presented by the Treasury Department, and those views are supported by the authority of a carefully considered judgment of the Circuit Court of the United States for the Northern District of California.**

1. The question as to the true construction of that section came before Judge Sawyer, Circuit Judge, and Judge Sabin, District Judge of Nevada, holding the Circuit Court, in San Francisco, in the case of Ah Ping, decided March 30, 1885 (11 Sawyer, 20).

Judge Sawyer, delivering the opinion of the Court, said:

"If we have interpreted the principles established by the Supreme Court aright, the result is that *section 6* of the Restriction Act is not applicable to Chinese subjects, residents of the United States, who left the United States, for foreign countries for temporary purposes, intending to return, before the passage of the amendatory Restriction Act, having a right to return at the time of their departure, and who did not return until after the passage of the Act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure, since the passage of the Act. This is the construction acted upon by the Executive Department of the Government, and, we we think, is fully justified in these particulars, by the decision of the Supreme Court."

The Court observed:

"As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand. Hence the provision. As to those resident, or domiciled in this country,

we have ourselves the best means of identification; while as to many of them even, in their native country, and much less when they are temporarily in other foreign countries, there is no practical means of either identification, or for procuring the certificate prescribed.

"The United States Statutes do not now, nor have they ever, required or provided for the issue of any certificates in this country to resident Chinese, other than laborers, who are about to depart, temporarily for business or pleasure either to China or other foreign countries. There are many Chinese merchants in California, who have been domiciled in the State from twenty to thirty-five years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. *To require such parties, every time they go to another country to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return.*"

2. Prior to this decision, the question had been ruled the same way by the Treasury Department on six different occasions.

In an opinion by Secretary Folger (Treasury Department circular, 6240), it was ruled "that the right of Chinese, other than laborers, to come into the United States did not depend on the production of any certificate whatever, but that the want of such certificate might be supplied by satisfactory evidence *aliunde*."

This decision was made prior to the passage of the amendatory restriction act of 1884, but in later rulings by the same Department, the decision of Judge Folger was affirmed.

On September 25, 1884, Judge Gresham, then Secretary of the Treasury, in response to an inquiry from the collector of customs at Port Townsend, Washington Territory, as to whether he might issue certificates to departing merchants as a matter of convenience, and for the purpose of identifying them on their return, in

the absence of any provision of law therefor, decided (Treasury Department circular, 3358 D) as follows:

"With regard to the certificate devised by you for the identification of returning Chinese merchants, you are informed that in the absence of any provision of law as to the evidence to be required on the re-entry of Chinese merchants no objection is perceived to your furnishing for the convenience of parties and your own protection merchant certificates similar to the certificate provided in section four of the act of July, 1884, as evidence of the right to re-entry of Chinese laborers."

On December 2, 1884, Mr. H. F. French, Assistant Secretary of the Treasury, decided:

"Persons known or proved to your satisfaction to be Chinese merchants who resided in the United States at the date of the treaty of 1880 are entitled to go from this country and return at pleasure. Certificates of the Chinese consul general at San Francisco may be regarded as *prima facie* evidence in such cases."

A similar decision was subsequently made by Secretary McCulloch on December 6, 1884, December 27, 1884, and January 14, 1885.

In the decision of December 27, 1884, Mr. McCulloch says:

"Section 6 of the Act of 1884 applies only to Chinese merchants coming for the first time to the United States. Chinese merchants, former residents in the United States, may be admitted on any satisfactory proof of such facts, by certificate or otherwise."

And in the decision of January 14, 1885, the Secretary again arrived at the same conclusion:

"Section 6 of the act of 1884 does not apply to Chinese persons other than laborers lawfully in the United States; such persons are by treaty entitled *to come and go of their own free will and accord;* and when they leave the United States are entitled to re-enter on

any evidence satisfactory to the collector that they are not Chinese laborers."

3. After the decision in the *Ah Ping Case*, the question again came before the Treasury Department, and on November 7, 1888, Mr. J. H. Maynard, Assistant Secretary of the Treasury, held as follows:

"Chinese merchants are not affected by the exclusion act of the 1st ultimo, and those now resident in the United States who visit foreign countries may be admitted on their return upon any evidence of their identity satisfactory to the collector as prescribed in paragraph 6, decision 6722."

The same question arose in the Treasury Department on July 3, 1890, when acting Secretary Batcheler decided as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States are not prevented by any existing laws or treaty from returning to the United States after visiting China or elsewhere. No certificates or other papers, however, are issued by the department or by any of the special officers to show that they are entitled to land in the United States; but it is suggested that such persons should, before leaving the United States, provide themselves with such certificates of identity as may be deemed proper showing that they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

## SEVENTH POINT.

**Congress has approved the judicial and legislative construction thus given to the 6th section of the Restriction Act.**

1. At the time of the passage of the Exclusion Act, of October 1, 1888, the entire Chinese question, including the rights of persons of the exempt class, laborers,

and persons in transit through the country, was before Congress, and was considered by it, as will appear by an act passed September 13, 1888, which act was to become effective only in the event of the ratification of a new treaty between the two Governments (25 Stats., 476).

Congress is presumed to have been aware of the settled construction which had been given to Sec. 6 of the Act of 1884 for a period of over four years, and its failure to prescribe new rules as to Chinese merchants domiciled in this country, is a distinct legislative approval of such construction.

2. It would attribute no extraordinary intelligence to Congress to assume that it was aware of what the other Department of the Government knew and had said, that it was impossible or impracticable for these resident merchants, every time they went abroad, to procure these foreign certificates, and that to require them to produce them, as the only evidence of their right to re-enter the country, would be in effect absolutely and unconditionally to *exclude* them.

Henderson *v.* Mayor of N. Y., 92 U. S., 268.

Congress was not willing that the 6th section of the Restriction Act should be applied to Chinese merchants, who, under the protection of treaty stipulations, and the public law of nations, had established their domicile in the United States, and acquired property and commercial interests, to the proper enjoyment of which the right of free exit from and entrance to the United States, was well known to be an essential and indispensable condition.

## EIGHTH POINT.

**Independently of all other considerations, it must be presumed that Congress never intended, by the Restriction Act, to endanger the prosperity of our growing commerce with China, by excluding Chinese merchants residing and carrying on their business in the United States, or putting any unnecessary or embarrassing restriction upon their indispensable right to go and come of their own free will and accord, guaranteed to them by these treaty stipulations.**

The commerce carried on from our shores, with China, by these merchants, had been steadily increasing since the conclusion of the Burlingame Treaty in 1868, as appears by the valuable note in the margin of the opinion of the Circuit Court for the Northern District of California in the case of the Chinese merchant, *Lem Yam Choze* (13 Fed. Rep., 611), cited above, decided in 1882.

The export of flour from California, at the port of San Francisco, when the Burlingame Treaty was concluded, amounted to about 20,000 barrels a year, while the export of that article, in 1881, amounted to 271,118 barrels, ninety per cent. of which was shipped by Chinese merchants.

The shipments of flour by these merchants, for 1890, and ten months of 1891, amounted to 757,136 barrels, or about 415,373 barrels for the twelve months of 1890, equivalent to 34,614 barrels per month, or 1,154 barrels per day. (See Appendix.)

This export trade in flour, at the port of San Francisco, has thus very nearly doubled in a period of nine years.

Our Minister to China, in a dispatch to the State Department in 1881, reported our trade with China as

second only in importance to that of Great Britain (For. Rels., 1888, vol. 1, p. 343).

Any construction of the Restriction Act, not in harmony with our treaty stipulations, and which would tend to lessen that commerce, should certainly be repudiated.

The subject of our future relations, including our commerce, with that great Empire which confronts us on the West—between the youngest and the oldest of civilizations—has been recently discussed, in an interesting paper, by an able and accomplished man, Mr. John Russell Young, formerly our Minister to China (New Life in China, North American Review, October, 1891, p. 420).

The author well observes: "The Chinese are our nearest neighbors. The ocean between us is not as wide as the ocean to Liverpool twenty years ago. China craves as necessaries our cotton and petroleum. The cotton grows on our plantations; the petroleum comes from our caverns. There is no reason why the entire China trade, under a judicious system of political sympathy, might not be one of the most valuable assets in the sum of American maritime greatness."

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, and that the case should be remanded to the Circuit Court with directions to order the discharge of the appellant.

J. HUBLEY ASHTON,
THOMAS D. RIORDAN,
*Of Counsel for Appellant.*

## APPENDIX.

**Statement by Mr. Frederick A. Bee, the Chinese Consul at San Francisco, relating to Chinese merchants.**

| | |
|---|---|
| Value of real estate in the United States estimated | $2,225,000 |
| Value of personal property estimated | 2,000,000 |
| Customs duties paid at San Francisco annually (estimated) | 2,250,000 |
| Shipment of flour by Chinese merchants for 1900 and ten months of 1901, 75,130 barrels (official) | 342,707 |
| Ginseng exported for ten months of 1901, 211,605 pounds, valued at (official) | 253,926 |

Signed: FRED'K A. BEE,
*Chinese Consul.*

EXPORTS TO CHINA FROM SAN FRANCISCO.

The published summary of the *Merchants' Review* for 1900 shows that the exports to China from the port of San Francisco, during that year, consisting of flour, farm products, ginseng, and the various articles of commerce, either in a crude or manufactured state, were of the value of $3,114,757.

Supreme Court, U. S.
FILED,
JAN 13 1892
JAMES H. MCKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

LAU OW BEW, APPELLANT,
*vs.*
THE UNITED STATES.
No. 1458.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE APPELLEE.

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## BRIEF FOR THE APPELLEE.

The consideration of the preliminary circumstances and proceedings of this case by this court upon the hearing of the petition for a writ of certiorari, and the opinion rendered upon said petition, and the statement made on behalf of the appellant, render it unnecessary for the appellee to set forth here a history or statement of the case.

### THE FACTS AS AGREED UPON.

The following stipulation presents the case as it was agreed upon by the respective parties, and as it was heard and determined by the court below. (Rec., p. 12.)

> In the circuit court of the United States for the northern district of California. In the matter of Lau Ow Bew on habeas corpus.

STATEMENT OF FACTS.

It is hereby stipulated and agreed that the following are the facts herein:

1. That the said Lau Ow Bew is now on board the steamship *Oceanic*, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong-Kong, and is detained and confined thereon by Capt. Smith, the master thereof.

2. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

3. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

4. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

5. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money, amounting to many thousands of dollars, as duties upon imports.

6. That on the 30th day of September, A. D. 1890, the said passenger departed from this country, temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship *Oceanic* on the 11th day of August, A. D. 1891.

7. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Fran-

> cisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese Government mentioned in section 6 of the Chinese restriction act of May 6, 1882, as amended by the act of July 5, 1884.

If this case is one that necessarily requires the granting of a decision against the United States, and is to be limited as to facts strictly to such statements as are specified in the stipulation, then there is little to be said.

The signed stipulation (pp. 12, 13) not only alleges that the petitioner is now a resident of the United States, but it can scarcely be said to assert that he is a Chinese person, or one not born upon American soil.

It may be fairly deduced, however, from other portions of the record that Lau Ow Bew is a Chinese under the exclusion acts.

The representative of the steamship company making return to the writ reports that the petitioner is held in "custody by the direction of the customs authorities of the port of San Francisco, Cal., under the provisions of the Chinese restriction act." (p. 6.)

The United States attorney, intervening on behalf of the United States, says of petitioner (p. 7):

> That the said person in whose behalf said application was made is by race, language, color, and dress a Chinese person.

The judgment of remand entered in the circuit court, after the matter had been duly heard, speaking of the petitioner (p. 10), says:

> It is further adjudged and found that he came from China by the steamship *Oceanic*, and is a Chinese person forbidden by law to land within the United States and has no right to be or remain therein.

The opinion delivered in the circuit court (Beatty, J., (p. 14) says:

> The petitioner is a subject of the Emperor of China, whence he arrived at the port of San Francisco on the 11th day of August, 1891.
>
> That from an agreed statement of facts it appears that the petitioner for the past seventeen years has been a merchant and is a member of a prominent Chinese mercantile firm of Portland, Oregon, where he has during that time resided. That on September 30, 1890, he went to China, intending shortly to return to this country and to his business, which he did on said 11th day of August, and without procuring from the Chinese Government the certificate required by the act named. The only question for determination is, whether a Chinese person who, having been domiciled in this country as a merchant and temporarily leaving it, can reënter without such certificate.

Therefore, although no testimony appears in the record, and the petitioner carefully avoids all admission that he is a Chinese person, it must be inferred that he is of Chinese birth, and that he is a subject of the Emperor of China.

TREATY PROVISIONS TO BE CONSIDERED.

A.

Sections 5 and 6 of the Burlingame treaty, signed in 1868 and proclaimed in 1870 (16 Stat., 740), contain the following provisions:

> ARTICLE V. The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other for purposes of curiosity, of trade, or as permanent residents. * * *
>
> ARTICLE VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. * * *

B.

By the treaty of November 17, 1880, proclaimed October 5, 1881 (22 Stat., 826), which recites in its preamble that—

> Whereas the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immi-

gration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit—

The two governments entered into certain articles in modification of the preëxisting treaty.

Articles I and II are as follows:

ARTICLE I.

Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ARTICLE II.

Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded

all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

By Article IV it is provided that legislative measures adopted by the United States shall be communicated to the Government of China, and that:

> * * * If the measures as enacted are found to work hardship upon the subjects of China the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him; and the Chinese foreign office may also bring the matter to the notice of the United States minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result.

CONGRESSIONAL ENACTMENT.

Section 6 of the act of May 6, 1882 (22 Stat., 58), as amended July 5, 1884 (23 Stat., 115) (the matter inserted in amendment being italicized), reads as follows:

> SEC. 6. That in order to the faithful execution of *the provisions of* this act, every Chinese person, other than a laborer, who may be entitled by said treaty *or* this act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time such Chinese person shall be a subject*, in each case to be evidenced by a certificate issued *by such* government, which certificate shall be in the English language *and shall show such permission, with the name of the permitted person in his or her proper signature*, and which certificate

shall state the *individual, family, and tribal* name *in full*, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued*, and place of residence of the person to whom the certificate is issued, and that such person is entitled *by* this act to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant" hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be vised by the indorsement of the diplomatic representative of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States of the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the state-*

*ments therein contained are untrue, it shall be his duty to refuse to indorse the same.* Such certificate *vised as aforesaid* shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States at which the person named therein shall arrive, *and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

A concise statement of provisions of the acts of May 6, 1882, and July 5, 1884, as applied to the case at bar, is set forth in *Wan Shing* v. *United States* (140 U. S., 426, 427), as follows:

> The sixth section of the act of May 6, 1882 (22 Stat., 58, 60, c. 1, par. 6), provides that, for the faithful execution of the treaty of November 17, 1880, every Chinese person, other than a laborer, who may be entitled by it and by that act to come within the United States, and who is about to come, "shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said Government, which certificate shall be in the English language, or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any; the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued, and that such person is entitled conformably to the

treaty in this act mentioned to come within the United States. Such certificate shall be prima facia evidence of the fact set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive." From this provision diplomatic and other officers of the Chinese Government traveling upon the business of that Government are exempted, their credentials being taken as equivalent to the certificate.

By the act of July 5, 1884 (23 Stat., 115, c. 220), this section 6 of the act of 1882 was amended and enlarged so as to provide for the permission to be obtained from the Chinese Government, or such other foreign government of which at the time the Chinese person shall be a subject; and declaring that the certificate provided for shall, before he goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic or consular representative of the United States in the foreign country from which such certificate issues, whose duty it is made to examine into the truth of the statements therein before indorsing it, and if they are found to be untrue to refuse such indorsement. The section then declares that "such certificate, viséd as aforesaid, shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, *and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States*; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

## THE QUESTION.

The question involved in this examination may be fairly stated as follows:

Is a Chinese person who was domiciled and engaged in business as a merchant in the United States for a period of years previous to 1884, and who, after the passage of the act of July 5, 1884, returned to China, intending to come back to this country and continue business, at his convenience, entitled to reënter the United States without such a certificate as is specified in section 6 of the act of May 6, 1882, as amended by said act of 1884?

## I.

### LAU OW BEW IS A CHINESE PERSON, SUBJECT TO THE CONDITIONS IMPOSED BY SECTION 6, AS AMENDED.

The petitioner left the United States September 30, 1890, and came into the port of San Francisco August 11, 1891, being thus out of the country more than ten months.

As the act of July 5, 1884, had been upon the statute books for a half dozen years before he went away, he is chargeable with a knowledge of its requirements. From October, 1890, to August, 1891, the inference is necessary that petitioner was a Chinese person, a subject of the Emperor of China, living in the country of his birth and resuming the domicil of origin.

His remaining in China, or his return to this country in the manner permitted by its laws depended upon himself.

Lau Ow Bew, immediately before going on board the *Oceanic* at Hong Kong, was a "*Chinese person, other than a laborer,*" and was entitled by the terms of the treaty "*to come within the United States.*" So far as his purpose or intent could control, he was "*about to come to the United States*" from China.

But he could come only in accord with our laws. Therefore, it was necessary, under the terms of the amended act, that he should, before going on board, "obtain the permission of and be identified as so entitled by the Chinese Government * * * to be evidenced by a certificate, issued by such government."

It is provided that the certificate shall be in the English language, shall show such permission, the name of the permitted person in his or her proper signature; the name, family, title, and rank; the physical description, the former and present occupation or profession, and when, where, and how long pursued, and the place of residence of the person to whom the certificate is issued, "and that he is entitled by this act to come within the United States." And it is enacted that this certificate "shall be the sole evidence permissible on the part of the person so producing the same to esablish a right of entry into the United States."

But it is argued that Congress did not intend this act to apply to Chinese persons that had been doing business in the United States. It is submitted that the phraseology of the act controverts this argument. The general phrase is plain, and its scope is indicated by the expressed exception.

The act applies in terms to "*every Chinese person*" "other than a laborer," except those protected by the thirteenth section.

An exception that recognizes the breadth of the general application is the exception as to diplomatic and other officers and their servants mentioned in section 13 of the act.

These exceptions indicate that outside of them the words "every Chinese person" were used without a restriction, and that, subject to these exceptions, the requirements of the act apply to all Chinese persons.

This broad construction seems to be recognized by the phraseology of the first clause of section 15, which says, "that the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power." The act applies in specific terms to "every Chinese person" not a Chinese laborer, or a diplomatic or other officer, or a servant of such officials.

It can not be claimed that subjects of the Emperor of China engaged in trade in this country are not "Chinese persons."

It is part of the case that Lau Ow Bew is not a Chinese laborer, a Government officer, or the servant of an official.

It therefore appears plainly that he is one of the class that the law of the United States declares shall obtain and produce the certificate required by and described in section 6.

## II.

### CONGRESS HAS FULL POWER TO EXCLUDE FOREIGNERS AND TO ANNUL TREATIES.

It is a natural and inherent right of every nation to exclude or to send away foreigners whenever its government deems that the interests of its people require such exclusion or deportation.

It is settled law that Congress may by enactment render nugatory or annul any treaty theretofore existing with any nation.

If it were necessary to invoke these powers to support the provisions of section 6, they furnish, in connection with the history of Chinese immigration, full authority and justification for the somewhat exacting requirements of that section.

## III.

### THE REQUIREMENTS OF SECTION 6 ARE BASED UPON THE PROVISIONS OF THE SUPPLEMENTAL TREATY OF 1880.

It is admitted that the Burlingame treaty intended to grant to the Chinese the privileges and immunities in the United States permitted by this Government to citizens or subjects of the most favored nation.

But this broad grant was modified and changed by the supplemental treaty of 1880.

The latter treaty was entered into, as is shown by its preamble, "because of the constantly increasing immigration of Chinese laborers to the territory of the United

States, and the embarrassments consequent upon such immigration."

By this treaty it is agreed between the nations that the United States, upon the existence of specified conditions—to be determined by its own Government—may regulate, limit, or suspend the coming or residence here of Chinese laborers.

It is true that it is stated that "the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations."

And it is also true that by article 2 merchants and others designated, "and Chinese laborers who are now in the United States, shall be allowed to go and come of their free will and accord," and shall be accorded all rights, privileges, and immunities and exemptions accorded to the citizens or subjects of the most favored nation.

This last clause only assures like rights where the circumstances are similar.

But it must be understood, and it is not to be disregarded that underlying these general and somewhat indefinite provisions is the superior right which this treaty was especially created to secure, viz: the right of the United States to protect the interests of its own people, and the good order of the country and of any locality within the territory thereof, by regulating, limiting, or suspending the coming here, or the residence here, of Chinese laborers.

Therefore it may be asserted justly that it is within the scope of this treaty for the United States to enact such laws as experience proves to be needful, and as the proceedings and methods of Chinese laborers render neces-

sary, to protect the people of the United States to the full intent contemplated by this supplemental treaty.

If this Government has ascertained that on account of the acts of Chinese subjects it is powerless to protect the interests of the people it has in charge according to the true intent and purpose of the treaty of 1880, without requiring Chinese merchants going to China or going abroad to obtain and to produce upon their return the certificate designated in section 6 of the act of 1884, then this Government has the right to require such certificate.

It is therefore submitted that section 6 of the amending act of 1884 as construed and applied in the case of Wan Shing is authorized by, and is not in contravention of, the supplemental treaty of 1880.

## IV.

SECTION 6 IS FRAMED TO PREVENT CHINESE LABORERS FROM COMING INTO THIS COUNTRY UNDER THE FALSE PRETENSE THAT THEY BELONG TO THE ADMITTED CLASSES.

(*a*) No better check to the laborer who seeks to come as a merchant, and who is ready to make his way by perjury, could be devised than to require the Chinese Government to certify, in addition to the other facts required, "the nature, character, and estimated value of the business carried on by him prior to and at the time of his application."

In a case like that of Lau Ow Bew some hardship may arise from the law. In a case like that of Wan Shing (140 U. S., 424) the fraud would be exposed and defeated

at the port of attempted shipment, instead of struggling through a contest that could only be disposed of by the Supreme Court.

It is no unreasonable hardship upon the Chinese Government that it shall be called upon to certify as to its citizens domiciled in the United States or elsewhere, if they are about to come here from China.

It is entirely practicable for any Chinese merchant in the United States, about to return to his native country, to have the coöperation of the minister, representatives, and officials of his Government in making up and preserving a record that shall exhibit all of the facts required to appear in the certificate prescribed by section 6.

The requirements of section 6 are not beyond the capacities of Chinese administration.

(*b*) It is claimed on the part of the petitioner that the difficulties arising to Chinese who have been domiciled here in furnishing the evidence required to be set forth in the certificate are such as to show that such domiciled Chinese persons could not have been included within the intent of the enactment.

It must be noted (as it is well known) that one of the embarrassments that have interfered with the exclusion of Chinese laborers from this country, has been their readiness to assert and to make oath that they belong to the merchant class or to some other of the admitted classes. The reported cases show a carefully prepared method, resting upon perjury, of bringing in laborers by falsely alleging them to be connected with some Chinese firm or establishment existing in this country. In view of this

it is not unnatural that Congress should require of a person in China who claims to be engaged in trade in the United States, that he shall be identified and shown to be entitled by the Chinese Government.

The whole scheme of section 6 is one to stop and turn back the multitude of Chinese laborers who pay no respect to our wishes or our laws, and who are prompt to employ fraud and perjury in order to place themselves in the ranks of competition in our labor markets.

Section 6 does not prevent the coming of merchants or other entitled persons who have never been here. Neither does it preclude the return of merchants or other entitled persons domiciled here, or who have resided here.

Congress seeks by this section to execute the protective clauses of the treaty of 1880, which authorize the United States to restrict the coming of Chinese laborers.

This legislation places such safeguards about the coming of all Chinese persons, not connected with diplomatic or official service, as experience has shown to be necessary to prevent the unlawful entry of large numbers of Chinese laborers. This Congress had the right to do, and having the right and power so to do, it was clothed with the right and power to determine the means that should be used to accomplish the result sought.

## V.

APPELLANT'S CONTENTION, THAT THE ENFORCEMENT OF THE CONSTRUCTION CLAIMED BELOW ON THE PART OF THE UNITED STATES IS TANTAMOUNT TO AN ABSOLUTE PROHIBITION OF THE RETURN OF DOMICILED CHINESE MERCHANTS WHO LEAVE THIS COUNTRY FOR TEMPORARY ABSENCES, IS ENTIRELY WITHOUT FOUNDATION.

It is hardly a supposable case that a Chinaman who is domiciled in the United States and engaged in trade there will be a subject of any other foreign country than China. The act does not require any named officer of the Chinese Government, or one located at any named place, to issue the certificate evidencing the identity and the permission to come; it is simply required that the Government (*i. e.*, some proper officer of the Chinese Government) shall do so. It is not only not impossible, but it is entirely practicable for that Government, through or by its minister, consular officers, and representatives, to require every Chinese tradesman in the United States, upon leaving this country with intent to return to it, to furnish such proofs of all the things required to be shown by the certificate, that a responsible officer of that Government can make the certificate and a consular representative of this Government can visé the same.

It must be admitted that officials of both governments may be put to much inconvenience; but this is made necessary by the pertinacious and unceasing struggle of Chinese laborers to force themselves unlawfully into this country.

The fault of the position occupied by counsel for the appellant is that they treat the subject-matter as a controversy made by the United States against Lau Ow Bew. On the other hand, this petitioner's case and the embarrassments thereof arise indirectly from the legitimate efforts of this country to prevent being overrun by throngs of those of his nationality that constantly appear in our harbors and upon our borders with intent to steal in, in violation of treaties and laws.

## VI.

### THE PRACTICE OF OFFICERS OF THE TREASURY DEPARTMENT DOES NOT CHANGE THE EFFECT OF THE STATUTE.

It is claimed in appellant's behalf that the practice of Treasury officials in cases somewhat analogous to his has determined the law as applicable to him.

If those officials construed the law according to its intent and meaning their construction should control. But if they failed to give full credit to the scope and purpose of the law, and failed to give the country the protection in the premises that Congress intended, the country has the right to look to the courts for a correction of the error.

It is respectfully submitted that the petitioner is subject to exclusion from the United States until he shall comply with the requirements of the enactment under consideration.

A. X. PARKER,
*Assistant Attorney-General.*

# Supreme Court of the United States.

OCTOBER TERM, 1891.

LAU OW BEW, *Appellant*,
vs. No. 1,458.
THE UNITED STATES.

**Synopsis of Treasury Decisions.**

6574.

CHINESE MERCHANT TRAVELLERS.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *September 25, 1884.*

SIR: The Department is in receipt of your letter of the 12th instant, inclosing a blank form of certificates with descriptive list, furnished at your port to *Chinese merchants and professionals residing in the United States* and having to visit places in British Columbia in the course of their business.

You state that the certificates are necessary as a means of identification upon the return of the merchants from British Columbia to your port, and you request the Department's approval of the practice until such time as the Chinese Government shall appoint or station a consul in British Columbia.

You also request to be advised whether, under the amended Chinese act, the wife and children of a Chinese merchant share in his right to enter the United States.

With regard to the certificates devised by you for the identification of *returning Chinese merchants*, you are informed that, in the absence of any provision of law as to evidence to be required on the re-entry of Chinese merchants, no objection is perceived to your furnishing, for the convenience of the parties and your own protection, merchants' certificates similar to the certificates prescribed in section 4 of the act of July 18, 1884, as evidence of the right to *re-entry* of Chinese laborers.

As to the right of the wife and children of a Chinese merchant to share in his right of coming to the United States, the Department is of the opinion that there is nothing in the law to prevent their being treated as following the condition of the husband and father.

This view accords with the recent opinion of Judges Sawyer and Hoffman in the Circuit Court for the District of California, who held that the wife or minor child of a man of the Chinese race coming to the United States, other than a Chinese laborer, is a "Chinese person" within the meaning of the law, and entitled to enter upon the production of the required certificate, but not otherwise. That they can not, nor either of them, enter upon the certificate issued to the husband or father alone, not embracing the required description and name of the wife or child; that there must be either an independent certificate such as required, or the certificate issued to the husband or father must also contain a certificate of the facts required by the statute both as to the wife and as to each minor child sought to be introduced.

Very respectfully,

W. Q. GRESHAM,
*Secretary.*

COLLECTOR OF CUSTOMS,
*Port Townsend, Washington Territory.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *December 2, 1884.*

*Collector of Customs, San Francisco, Cal.:*

Persons known or approved to your satisfaction to be Chinese merchants who resided in the United States at the date of treaty of 1880, are entitled to go from this country and return at pleasure. Certificates of the Chinese consul-general at San Francisco (see synopsis 6240, March 14, 1884), may be regarded as *prima facie* evidence in such cases.

H. F. FRENCH,
*Assistant Secretary.*

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TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *December 27, 1884.*

Collector instructed as follows: "Section six, act of eighty-four, applies only to Chinese merchants coming for first time to the United States. Chinese merchants, former residents in the United States, may be admitted on any satisfactory proof of such facts by certificate or otherwise."

H. MCCULLOCH,
*Secretary.*

H. S. BROWN,
*Attorney, Oriental Steamship Company, San Francisco, Cal.*

6722.

CHINESE PERSONS COMING TO THE UNITED STATES.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *January 14, 1885.*

*To officers of the customs and others:*

The following regulations relating to the rights of Chinese laborers to enter the United States are deemed to be in accordance with the recent decision of the Supreme Court in the case of *Chew Heong* v. *The United States*, and the existing regulations relating to the admission of persons other than laborers into the United States are restated and modified for your information and government:

1. Chinese laborers lawfully residing in the United States, and who left the United States by sea after the passage of the act of July 5, 1884, are entitled to enter the United States only upon the production of the certificate prescribed in section 4 of that act, or of the certificate prescribed in section 5 of the act of May 6, 1882, in case they depart by land.

2. The fourth section of the act of May 6, 1882, as amended by the act of July 5, 1884, prescribing the certificate which shall be produced by a Chinese laborer as the only evidence permissible to establish his right of re-entry into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884, and such persons may be permitted to land without any certificate upon pro-

duction of evidence satisfactory to the collector of such facts.

3. Chinese laborers residing in this country at the date of the treaty of November 17, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the act of May 6, 1882, and who left the United States before the passage of the act of July 5, 1884, are entitled to re-enter the United States upon the production of the certificates prescribed by sections 4 and 5 of the act of May 6, 1882. Certificates issued under the act of May 6, 1882, and decision 6240, before the passage of said act of 1884, are to be regarded as having the same effect as if said act of 1884 had not been passed.

4. Chinese persons other than laborers coming to the United States for the first time from China, can be permitted to enter the United States only upon the production of the certificate prescribed by section 6 of the act of July 5, 1884, such certificate being the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States.

5. Chinese subjects, not laborers, desiring to come to the United States from countries other than China, may do so on production of a certificate corresponding to that required by section 6 of the act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, if there be one at the port of departure, countersigned by a United States consular officer, or, if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer.

6. *Section 6 of the act of 1884 does not apply to Chinese persons other than laborers lawfully in the United States. Such persons are, by treaty, entitled "to come and go of*

*their own free will and accord," and when they leave the United States are entitled to re-enter on any evidence satisfactory to the collector that they are not Chinese laborers.*

For the convenience of such persons, and of the customs officers and others, such persons who may desire to depart from and return to the United States may enter the United States on production of a certificate corresponding to that required by section 6 of the act of July 5, 1884, to be issued by the collector of customs of the port of departure, which certificate may be *prima facie* evidence of a right to enter the United States.

7. The regulations contained in decision 5544, and dated January 23, 1883, relative to the transit of Chinese laborers through the territory of the United States, will be applied to Chinese persons intending to so go in transit through the United States.

8. Chinese persons who may be compelled to touch at the ports of the United States, in transit to foreign countries, may be permitted to land under the regulations of January 23, 1883 (Synopsis 5544), so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination or the voyage of which may form part of the route necessary to carry them to their destination.

H. McCULLOCH,
*Secretary.*

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WASHINGTON, D. C., *Nov. 7, 1888.*

*Collector of Customs, San Francisco:*

Chinese merchants are not affected by exclusion act of the first ulto., and those now resident in the United States, who visit foreign countries, may be admitted on

their return upon any evidence of their identity satisfactory to Collector as prescribed in paragraph 271, decision sixty-seven twenty-two. This telegram is transmitted you at the instance Thomas D. Riordan, Attorney.

MAYNARD,
*Assist. Secretary.*

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**Synopsis of Treasury Decisions.**

10097

TREASURY DEPARTMENT, *July 3, 1890.*

*Return of Chinese persons to the United States after a visit to China.*

CIRCULAR.

The following instructions regarding the re-entry into the United States of Chinese persons after a visit to China, are published for the information of all concerned, the same being based upon decisions of the Department heretofore made:

*First.* Chinamen who are laborers are, under the exclusion act of October 1st, 1881, absolutely debarred from relanding in the United States upon their return from China. They are absolutely debarred from landing in the United States under any circumstances whatever, unless it be for transit across United States territory under the Department's regulations of July 25, 1889, (synopsis 9519), September 28, 1889, (synopsis 9637) and December 6, 1889, (synopsis 9760).

*Second.* Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by existing law or treaty from returning to the United States after visiting China or elsewhere.

No certificates or other papers, however, are issued by the Department, or by any of its subordinate officers, to show that they are entitled to land in the United States, but it is suggested that such persons should, before leaving the United States, provide themselves with such proofs of identity as may be deemed proper, showing that they have been residents of the United States, and that they are not laborers, so that they can present the same to and be identified by the Collector of Customs at the port where they may return.

*Third.* Chinese persons, not laborers, who may come to the United States for the first time, are only entitled to land upon compliance with *section 6*, Act of July 5, 1884, which prescribes that such persons "shall obtain permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature."

GEORGE S. BATCHELLER,
*Acting Secretary.*

Office Supreme Court U. S.
FILED.
DEC 7 1891
JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

LAU OW BEW, APPELLANT,
*vs.*
THE UNITED STATES. } No. 1458.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

## MOTION TO ADVANCE.

# In the Supreme Court of the United States.

OCTOBER TERM, 1891.

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LAU OW BEW, APPELLANT,
*vs.*
THE UNITED STATES. } No. 1458.

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*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

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## MOTION TO ADVANCE.

And now, December 7, 1891, comes the Attorney-General, and moves the court to advance the above-named cause to an early hearing at the present term.

This case comes up from the United States Circuit Court of Appeals for the ninth circuit upon *certiorari* issued under the order of the Supreme Court of the United States, upon the petition of Lau Ow Bew.

The question in the case is, whether Chinese merchants domiciled in the United States who temporarily return to China for the purposes of business or pleasure may return to this country at their convenience without producing the

certificate of the Chinese Government specified in section 6 of the Chinese restriction act of May 6, 1882, as amended by the act of July 5, 1884.

It is not deemed necessary to explain to the court the importance of an early hearing of this case, as this court took note of the questions arising therein in considering the petition of Lau Ow Bew and the accompanying record, upon which a decision was announced and an opinion delivered November 16, 1891.

As one of the counsel for the appellant resides in California, it is respectfully suggested that the hearing of the case be set down for the 18th of January, 1892, to follow cases already assigned, if this disposition of the case shall meet the approval of the court.

W. H. H. MILLER,
*Attorney-General.*

Office Supreme Court U. S.
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JAMES. H. McKENNEY,
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# Supreme Court of the United States.

OCTOBER TERM, 1891.

No. .....

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**Ex Parte LAU OW BEW.**

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**Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination the case of**

**LAU OW BEW, Appellant,**

*vs.*

**UNITED STATES, Respondent.**

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**J. HUBLEY ASHTON,**
**THOMAS D. RIORDAN,**
**Counsel for Petitioner.**

IN THE

# Supreme Court of the United States.

October Term, 1891. No.——

***Ex Parte* LAU OW BEW, Petitioner.**

**Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination the Case of Lau Ow Bew, Appellant, vs. United States, Respondent.**

*To the Honorable, the Supreme Court of the United States:*

The petition of Lau Ow Bew respectfully shows to this Honorable Court as follows:

I. Your petitioner is a person of the Chinese race, and a natural born subject of the Emperor of China; but he is now, and for the past seventeen years has been, a resident of the United States of America, and of no other country, having his domicile in the city of Portland, in the State of Oregon; and during all of that time he has been a merchant engaged in the wholesale and importing business, as a member of the well-known commercial firm of Hop Chong & Co., in the said city of Portland.

II. Your petitioner, on the 30th day of September, 1890, departed from the United States on a temporary

visit to his relatives in China, with the intention of returning as soon as possible, and he did return to the United States on board of the steamship "*Oceanic*," which arrived at the port of San Francisco, in the State of California, on the 11th day of August, 1891. At the time of his departure he procured satisfactory evidence of his *status* in this country as a merchant, under the regulations of the Treasury Department of the United States, adopted July 3, 1890, one of which is as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by the existing laws or treaty from returning to the United States after visiting China or elsewhere. No certification or other papers, however, are issued by the department or by any of its subordinate officers to show that they are entitled to land in the United States, but it is suggested that such parties should, before leaving the United States, provide themselves with such proofs of identity as may be deemed proper, showing they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

III. Your petitioner, on his return to the United States, presented said proofs to the collector of the port of San Francisco, but the collector, while acknowledging the sufficiency of the same, and admitting that your petitioner was a merchant domiciled herein, and, therefore, entitled to the protection of the treaty between the United States and China, concluded July 28, 1868, popularly known as the Burlingame Treaty, and the supplemental treaty between the said Governments, concluded November 17, 1880, and the Act of Congress, entitled "*An Act to execute certain treaty stipulations relating to Chinese*," approved May 6, 1882, as amended July 5, 1884, refused to permit your petitioner to land,

on the sole ground that he failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the said Act of May 6, 1882, as amended by the said Act of July 5, 1884; and the collector based this refusal upon the opinion of this Honorable Court in the case of Wan Shing *v.* United States, No. 1414, October term, 1890, decided May 11, 1891.

IV. Your petitioner thereupon, to wit, on August 14, 1881, filed a petition in the Circuit Court of the United States for the Northern District of California for a writ of *habeas corpus* to obtain his discharge from detention, alleging, *inter alia*, that he was a merchant domiciled in the United States for seventeen years last past, and that it was claimed by the master of the said steamship that he could not be allowed to land under the provisions of the sixth section of the said Act of May 6, 1882, as amended by the said Act of July 5, 1884.

The writ was issued directed to the master of the said steamship, who produced the body of your petitioner before the said court on the 15th day of August, 1891, and made return to the writ that he held the petitioner in his custody "*by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act.*"

The United States District Attorney filed an intervention for and on behalf of the United States, and made opposition to the said writ. It was not alleged or pretended in such intervention, on behalf of the United States, that your petitioner was a laborer, or that the refusal of the customs officers at San Francisco to allow him to land, and his consequent detention by the master of the said steamship, were based upon the provisions of the Chinese Exclusion Act of October 1, 1888; but on the contrary, it was averred, in said intervention, that your petitioner was

lawfully detained by the said master because he was a Chinese person, and failed to produce to the collector of customs, or to any other authorized officer, the certificate of identification required by the said Act of 1882 as amended by the said Act of 1884.

An answer or traverse to the said return to the said writ, and the said intervention on behalf of the United States, was filed by the petitioner.

The said case was and is entitled and numbered in the Circuit Court of the United States for the Northern District of California, *In the Matter of Lau Ow Bew on Habeas Corpus, No. 11415.*

V. The said case was heard and determined by the said Circuit Court upon an agreed statement of facts, signed by the United States District Attorney, and the attorneys for the petitioner, and filed therein, which statement of facts is as follows:

"It is hereby stipulated and agreed that the following are the facts herein:

"1st. That the said Lau Ow Bew is now on board the SS. *Oceanic*, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

"2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"3rd. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

"4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"5th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports.

"6th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship *Oceanic* on the 11th day of August, A. D. 1891.

"7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884.

"CHARLES A. GARTER,
"*U. S. District Attorney.*
"HARVEY S. BROWN and
"THOS. D. RIORDAN,
"*Att'ys for Petitioner.*"

VI. Such proceedings were had in the said case in the said Circuit Court of the United States that on the 14th day of September, 1891, the said court rendered a judgment therein as follows:

"This matter having been regularly brought on for hearing before the court and the judge thereof, the United States attorney having appeared and intervened on behalf of the United States, and the same having been duly heard and submitted and due consideration thereon had, it is by the court now here considered,—

"That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date

of the petition herein illegally restrained of his liberty as therein alleged.

"It is further adjudged and found that he came from China by the steamship *Oceanic*, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein.

"It is, therefore, ordered that the said Lau Ow Bew be remanded by the United States Marshal for the Northern District of California to the custody whence he was taken, to wit, on board the said steamship to the custody of the master of said steamship, or, in case of a change of master, to the custody of the master thereof, whoever he may be, at the time of this order of remand; or to place him in the hands and charge of any party on board said steamship for the time being, representing the master or then in charge of said steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship whether still in port, not having departed therefrom, or having departed and returned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason, the said Lau Ow Bew can not be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came. And for the purpose of carrying this order into effect it is further ordered that the said marshal shall take the said Lau Ow Bew into their custody and him safely keep till said order shall be fully executed."

VII. The said case of your petitioner, in the said Circuit Court of the United States, was heard before and decided by the Hon. W. H. Beatty, District Judge of the United States for the District of Idaho, sitting in the said Court, and the opinion of the Court was delivered by him.

VIII. Your petitioner, on the same day, was duly allowed by the said Circuit Court an appeal from its said

judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and it was ordered by the court that a certified transcript of the record and of all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals.

IX. On the 3d day of October, 1891, a certified transcript of the record and of all proceedings of the said Circuit Court, in the said case, was filed in the United States Circuit Court of Appeals for the Ninth Circuit, and the said case was entered and docketed in the said Court of Appeals, and entitled *Lau Ow Bew, appellant*, v. *The United States, respondent*, No. 12.

The assignment of errors filed on behalf of your petitioner was as follows:

"Afterwards, to wit, on this first Monday in October, in the same term, before the judges of the Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the district of California, comes the said Lau Ow Bew, appellant, by Harvey S. Brown and Thomas D. Riordan, his attorneys, and says that in this record aforesaid there is manifest error in this, to wit:

"That the said Circuit Court of the Ninth Judicial Circuit, in and for the northern district of California, erred in deciding:

"1. That the appellant is not entitled to enter the United States.

"2. That he is not unlawfully restrained of his liberty.

"3. That the said appellant was required to produce the certificate required by section 6 of the Act known as the Chinese Restriction Act, passed May 6, 1882, as amended July 5, 1884.

"4th. That a Chinese merchant domiciled in the United States and departing therefrom temporarily with the intention of returning should, before being permitted to re-enter the United States, produce the certificate required by section 6 of the Act above referred to.

"5th. That he be remanded to the custody of the master of the steamship whence he was taken.

"And the said Lau Ow Bew prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

"HARVEY S. BROWN and
"THOMAS D. RIORDAN,
"*Attorneys for Appellant.*"

X. The case came on to be heard in the said Circuit Court of Appeals, on the 5th day of October, 1891, before the Hon. E. M. Ross, United States District Judge for the Southern District of California, and the Hon. Thomas P. Hawley, United States District Judge for the District of Nevada; and on the 7th day of October, 1891, the said court rendered a judgment affirming the said judgment of the said Circuit Court therein as follows:

"Appeal from the Circuit Court of the United States, for the Northern District of California.

"This cause came on to be heard on the transcript of the record from the said Circuit Court of the United States for the Northern District of California, and was argued by counsel, and the same having been duly considered and the opinion of the court having been read in open court and filed with the clerk, it is ordered that the judgment of the said Circuit Court be, and the same hereby is, affirmed and the cause remanded to said Circuit Court at the cost of the appellant.

"On motion of Thomas D. Riordan, Esq., counsel for the appellant, it is ordered that a stay of proceedings herein be, and the same hereby is, granted for and during the space of thirty days."

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished, and hereto annexed, as part of this application,

in conformity with rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals, and the same is marked Exhibit "A."

XI. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress entitled "*An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes*," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

XII. The said case was decided in the said Circuit Court of Appeals, as well as in the said Circuit Court, upon the supposed authority of the decision of this Honorable Court in the said case of Wan Shing *v.* United States, but the question presented by and involved in the said case of the petitioner was not presented by or involved in the said case of Wan Shing *v.* United States, and the said question was not decided in that case, nor was the decision of the same necessary for the determination of that case, by this Honorable Court.

Your petitioner is informed and believes that the question presented by and involved in his said case, was not discussed in any wise by counsel before this Honorable Court in the said case of Wan Shing *v.* United States.

XIII. It appears in the said agreed statement of facts, and it is thus admitted in this case by the Government of the United States, that the petitioner is and has been for seventeen years last past a Chinese merchant domiciled and doing business in the United States; that he departed therefrom September 30, 1899, on a temporary

visit to his relatives in China, with the intention of returning as soon as possible, and did return on August 11, 1891; that he was not prevented from landing by the authorities of the Government of the United States upon any claim or pretense that he was a laborer, excluded by the provisions of the Act of October 1, 1888; and that he was refused permission to land on the *sole* ground that he failed "to produce the certificate of the Chinese Government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884."

The question thus presented by the record in the case of your petitioner was and is, whether he is entitled, as a Chinese merchant, long domiciled in the United States, who had departed therefrom in September, 1890, for a temporary purpose, to re-enter the country without producing the certificate defined in section 6 of the Chinese Restriction Acts.

XIV. This Honorable Court declared, in the said case of Wan Shing *v.* United States, that the refusal to allow the petitioner therein to land was not grounded at all upon the said Act of May 6, 1882, but was based wholly upon the provisions of the Chinese Exclusion Act of October 1, 1888, which declared that it should be unlawful for any Chinese laborer who at any time before had been or was then, or might thereafter be, a resident within the United States, or who had departed or might depart therefrom and should not have returned before its passage, to return to or remain in the United States.

It was thus claimed and maintained by the authorities of the United States, in the said case, that the said Wan Shing was a laborer, and lawfully detained as such, and that he was not a Chinese merchant or within the exempt class when he sought to enter the United States.

It appeared, affirmatively, by the testimony of Wan Shing, as your petitioner is advised, that he was a youth only seventeen years of age, when he claimed to have been in the United States, and that he was, in fact, a laborer, and not a merchant, within the meaning of the treaties between the United States and China and the Chinese Restriction Acts; that he first came to the United States in 1879, and departed therefrom in 1882; and that he did not return to and seek to enter the United States until 1889. And there was no evidence in the said case, as your petitioner is advised, that Wan Shing, at the time of his departure from the United States, intended ever to return to the country, or to retain his domicile therein, if he ever had one.

XV. The petitioner is advised that the right of a Chinese merchant, admitted to be domiciled in the United States, and to have been domiciled therein for many years, who temporarily departed therefrom in the year 1890, *animo revertendi*, to re-enter the country without producing a certificate of identity, under the 6th section of the said Act of 1882, as amended in 1884, was not drawn in question in the said Wan Shing case.

XVI. Your petitioner is informed and believes that the case of Wan Shing *v.* United States, being No. 1414 on the docket of this court for the October term, 1890, and advanced on the motion of the Attorney-General, was submitted without argument of any kind on behalf of the appellant, and upon a printed brief of Mr. Assistant Attorney-General Parker on the part of the United States; and that no assignment of errors was filed in the case by the counsel for the appellant, who did not appear in court when the case was called for trial, and who telegraphed from San Francisco to the

clerk of this court that the case might be submitted upon the record. The appeal, in that case, was thus, as the petitioner is advised, virtually abandoned by the counsel for the appellant; and the petitioner is also informed and believes that substantially the only proposition in the brief for the United States, in the said case was that the testimony in the record showed that Wan Shing was a laborer, and as such was not entitled to land under the provisions of the Exclusion Act of October 1, 1888.

XVII. The importance and gravity of the question as to the rights of Chinese merchants, domiciled in the United States, under the treaties between the United States and China and the legislation of the United States to execute those treaties, will be recognized, when it is stated according to authentic statistics, that the Chinese merchants who are now domiciled in the United States are the owners and in possession of real and personal property valued at over $20,000,000; that they pay annually to the United States Government large sums of money as duties upon imports aggregating more than two millions of dollars; that nearly all of said merchants have branch houses in British Columbia, Cuba, Mexico, Peru, and the Hawaiian Islands; and that they are constantly and necessarily traveling between the United States and those countries, for the purpose of collecting moneys due to them, and attending to their various interests in their branch houses therein. If such Chinese merchants, when visiting those countries, are obliged to produce certificates of identity under the Restriction Acts, in order, after such temporary absences, to re-enter the United States, they would be required, before returning thereto, to proceed to China, and there attempt to procure such certificates. It is manifest, however, that it would be impossible for

those Chinese merchants who have been long domiciled in the United States to obtain the required certificates, because the Chinese government could not certify to the facts necessary to be set forth in them, nor could the proper diplomatic or consular representatives of the United States ascertain the truth in regard to such facts for the purpose of viséing and indorsing such certificates as provided by law.

XVIII. Before the promulgation of the opinion of this Honorable Court in the said case of Wan Shing *v.* United States by the Treasury Department of the Government of the United States, in August, 1891, and thus before the petitioner went to China, in September 1890, it had been uniformly held by that Department that section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884, was not applicable to Chinese merchants domiciled in the United States, and who had departed therefrom temporarily, and that they might lawfully return upon the production of such evidence as should be satisfactory to the various collectors of their *status* as resident merchants in the United States.

The first decision was rendered by the Hon. Charles J. Folger, on March 14, 1884; the second by the Hon. W. Q. Gresham, on September 25, 1884; the third by the Hon. H. F. French, on December 2, 1884; the fourth, fifth, and sixth by the Hon. Hugh McCulloch, respectively on December 6, 1884, December 27, 1884, and January 14, 1885.

The question, also, came before the United States Circuit Court for the Northern District of California on April 9, 1885, in the case of *Ah Ping* (reported in 11 Sawyer, 17), and it was there decided the same way; and thereafter the said Treasury Department, on November 8, 1888, and July 3, 1890, reaffirmed its previous rulings upon the subject.

The said decisions were thus all made before the petitioner left the United States to visit his relatives in China.

XIX. Under the said decisions Chinese merchants, domiciled in the United States, were accustomed to go and come, under the treaties between the United States and China, upon the production, on their return to this country, of such evidence of their *status* as was deemed satisfactory by the several collectors of the ports; and the records of the custom-houses will show, as the petitioner is informed and believes, that such practice was not attended by fraud.

XX. To require Chinese merchants domiciled in the United States, whenever they may depart therefrom temporarily, with the intention of returning thereto, to produce certificates from the Chinese government, in order to enable them to re-enter the United States, would seem to be equivalent, as has been observed, to an absolute refusal to permit their return; whereas the Treaty between the United States and China of November 17, 1880, guarantees to such merchants the right "to go and come of their own free will and accord."

XXI. Your petitioner thus respectfully submits that the question upon the legal and just construction and effect of the said Chinese Restriction Acts, involved in and presented by the said case of your petitioner, should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of the said question on the part of the petitioner and the United States.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit

Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled, Lau Ow Bew, appellant, *versus* The United States, respondent, number 12, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the Act of Congress entitled "*An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes*," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

LAU OW BEW,
By THOMAS D. RIORDAN,
*Attorney and Counsel for Petitioner.*

J. HUBLEY ASHTON,
THOMAS D. RIORDAN,
*Of Counsel for Petitioner.*

OFFICE SUPREME COURT U.S.
FILED
NOV 9 1891
JAMES H. MCKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1891.

No.

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**Ex Parte LAU OW BEW.**

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**Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination the case of LAU OW BEW, Appellant, vs. United States, Respondent.**

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## PRELIMINARY BRIEF SUBMITTED WITH PETITION.

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J. HUBLEY ASHTON,
THOMAS D. RIORDAN,
Counsel for Petitioner.

IN THE

# Supreme Court of the United States.

October Term, 1891. No.——

***Ex Parte* LAU OW BEW, Petitioner.**

**Application for Writ of Certiorari Requiring the United States Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination the Case of Lau Ow Bew, Appellant vs. The United States, Respondent.**

## Preliminary Brief Submitted with the Petition.

This is an application to the court to require the United States Circuit Court of Appeals for the Ninth Circuit, by certiorari, to certify to this court for its review and determination the case above mentioned, in which a final judgment was rendered by the Court of Appeals against the petitioner on the 5th of October, 1891.

The application is made under the provisions of the 6th section of the judiciary act of March 3, 1891, as follows:

"And excepting also that in every such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case

as if it had been carried by appeal or writ of error to the Supreme Court."

The court has provided, by its rules, that where application is made to it under the act, to require a case to be certified to it for its reveiw and determination, "a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as a part of the application."

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It appears by the petition, and the record of the Circuit Court of Appeals, furnished with it under the rules, that the case involved, and presented for determination by that court, the grave and important question upon the legal and just construction of the Chinese Restriction Act of 1882, as amended in 1884, as to whether or not the 6th section of the act is applicable to the petitioner, a Chinese subject, who has resided and carried on business, as a merchant, in the United States for very many years, and who, having temporarily departed therefrom, in September, 1890, on a visit to his relatives in China, with the intention of returning as soon as possible, returned to and sought to re-enter the United States, in August, 1891.

Has he the right, and is he entitled, to re-enter the United States, and go to his home in Portland, Oregon, without producing to the collector of the port of San Francisco, where he arrived on the 11th of August last, such a certificate of identification from the Chinese government as is mentioned in the 6th section of the amended Restriction Act of 1884?

The question was decided in the negative by the Circuit Court of Appeals, which held that the petitioner has no right to land in the United States, though his character and *status* were and are admitted by the authorities

of the Government of the United States, without producing to the collector of the port a certificate of identity, issued under the authority of the Chinese government, and that he must consequently be transported out of the limits of the country, which has been his home for many years.

The petitioner respectfully asks this honorable court, in the exercise of the authority conferred upon it by the act of 1891, to require the Circuit Court of Appeals to certify to it this case for its review and determination, in order that the judgment therein pronounced against him may be set aside, and he may be set at liberty, if that judgment shall be found by this court to be erroneous.

This court has never had occasion to decide the precise question as to whether the 6th section of the Chinese Restriction Act of 1882, as amended in 1884, is applicable to Chinese merchants residing and doing business in the United States, and departing therefrom for temporary purposes of business or pleasure with the intention of returning thereto, or whether the section is applicable only to those *coming for the first time*, or to persons having no present domicile or residence in the United States, but having an actual residence or domicile in a foreign country, about to come into the United States, either on business, for travel, or as temporary or permanent residents.

The petition shows that the question is one of very great importance, as a question touching the rights, not only of this petitioner, but also of many Chinese merchants residing in this country upon the faith of the treaties with China, and the construction and effect which have been given to the restriction acts by the authorities of the United States, and who have occasion for the necessary purposes of their business in the United States, to travel, from time to time, between that country and China, and other foreign countries.

The petition shows that this man has been a domiciled merchant in the United States for seventeen years, and that he must have come, therefore, in 1874, under the protection of the Burlingame Treaty, which guaranteed to Chinese subjects the right, without any condition or restriction, to come, remain in, and leave the United States, and to enjoy all the privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nations. (16 Stats., 740.)

When he left Oregon, in September, 1890, for the purpose of visiting his relatives in China, and when he left China, on his return, in July, 1891, it appeared to be the *settled construction* of the restriction acts that section 6 thereof was *not* applicable to Chinese mercants, who are domiciled in this country, and who departed therefrom temporarily, and that they might return thereto upon the production of such evidence as should be satisfactory to the several collectors, of their *status* as resident merchants in the United States.

If it was possible for him to obtain such a certificate from the Chinese government as is defined in the 6th section of the acts, when he left China for the United States, it was absolutely unnecessary for him to do so, in view of the construction of that section, which had been adopted by the Circuit Court in California, and acted upon by the Executive Department of the Government, and certainly he had no reason to anticipate any change in the law before he arrived at the port of San Francisco.

The petition respectfully submits that the question touching the application of section 6 of the restriction acts to the petitioner, when he reached that port, and his right to re-enter the country, upon the evidence alone of his *status* as a merchant therein, procured under the Treasury regulations, at the time of his departure for

China, is one which should be authoritatively adjudged by this Supreme Tribunal of Justice.

## THE FACTS OF THE CASE.

Happily there can be no possible dispute as to the facts of the case, as it was determined upon an agreed statement between the parties, which is set forth at length in the petition.

For seventeen years prior to his departure for China, in September, 1890, the petitioner had been a resident of Portland, and had carried on a wholesale and importing mercantile business there, as a member of the firm of Hop Chong & Co., which pays annually into the United States Treasury many thousands of dollars as duties on imports.

When he left the United States he intended to return as soon as possible, and he reached San Francisco, on his return, on the 11th of August, 1891.

At the time of his departure for China he procured satisfactory evidence of his *status*, in this country, as a merchant, and on his return he presented it to the collector of the port at San Francisco, but the collector, while acknowledging the sufficiency of the proofs, and admitting that petitioner was *a merchant domiciled in this country*, refused to permit him to land on the sole ground that he failed to present the certificate of the Chinese government mentioned in section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884.

The petitioner states that the collector based this refusal upon the opinion of this court in the case of Wan Shing *v.* United States, which was promulgated by the Treasury Department, on August 1, 1891.

That case was decided by the court on May 11, 1891 (140 U. S., 424).

As the petitioner must have sailed from China in

July, 1891, the Treasury regulations, based on the Wan Shing case, were not adopted until after his departure, and he could not have known anything about them until he reached San Francisco.

There was and is no pretense, by the authorities of the United States, of any right to exclude the petitioner as a *laborer*, under the Act of October 1, 1888 (25 Stats., 504).

The refusal of the Collector to allow him to land, and his consequent detention by the Master of the vessel, were founded upon the Act of May 6, 1882, and the Amendatory Act of 1884, and based upon the claim that he must establish, and could only establish, his right to re-enter the United States by producing a Chinese certificate of identity, although it was known to the Collector that he was a Chinese merchant in the United States, and it must have been apparent that considering the length of time he had been absent from China, where he must have lost his identity, it was impracticable, if not impossible, for him ever to obtain from the Chinese Government such a certificate as is defined in the 6th section of the Act of 1882, as amended in 1884.

In the Courts below the case was decided wholly upon the effect which it was thought necessary to give to the opinion of this Court in the case of Wan Shing *v.* United States (140 U. S., 424).

It was supposed that this Court decided, in the language of Judge Beatty, "*that the certificate defined by the law is absolutely necessary to the admission of any Chinese merchant.*"

The learned judge said that his only course was to follow the rulings of this Court as he understood them, and "*if I misconstrue them, that, or some other appellate court, can correct my error.*"

The courts in California plainly misunderstood, and gave undue effect to, the decision in the *Wan Shing* case.

The question in the present case was not before this Court, nor was it determined, in that case.

That case was not argued for the appellant, and no question whatever upon the just construction of the Restriction Acts was presented to the Court on his part, and no question of that kind was discussed by the counsel for the Government.

## POINTS.

### FIRST.

*The history of the question upon the construction and effect of the Chinese Restriction Acts, involved in the case of the petitioner, and the great importance and gravity of the question, render it peculiarly proper that the question should be authoritatively adjudged by this tribunal.*

1. It is to be presumed that Congress did not intend, in passing the Chinese Restriction Acts, to abrogate, impair, or in any way interfere with the rights guaranteed to Chinese persons of the exempt class by the Burlingame Treaty, concluded July 28, 1868, and the Supplemental Treaty of November 17, 1880.

Article 6 of the Burlingame Treaty is as follows:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most

favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States" (16 Stats., p. 740).

Articles 1 and 2 of the Supplemental Treaty of November 17, 1880, are as follows:

"ARTICLE 1. Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States or their residence therein affects, or threatens to affect, the interests of that country, or to endanger the good order of said country, or of any locality within the territory thereof, the government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, *other classes not being included in the limitations*. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE 2. Chinese subjects, whether proceeding to the United States as teachers, students, *merchants*, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed TO GO AND COME OF THEIR OWN FREE WILL AND ACCORD, and shall be accorded all the rights, privileges, and immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The title of the Restriction Act is "An act to *execute* certain treaty stipulations relating to China."

The debates upon the passage of the original and amendatory acts exhibit the utmost solicitude to protect the rights guaranteed to persons of the exempt class by the treaties referred to.

If Congress had intended to abrogate or impair those rights it would have said so in explicit terms, as it did in the Chinese Exclusion Act, which absolutely prohibits the coming or returning to this country of any Chinese laborer, and cancels the laborers' return certificates theretofore issued.

The power of Congress to abrogate and annul a treaty or any portion thereof, is unquestioned, but in doing so the language of the act must be clear and unmistakable.

If the act is ambiguous, or susceptible of two interpretations, that construction will be given to it which will conform with the provisions of the treaty, and protect and preserve the rights guaranteed thereby.

As was said by Mr. Justice Field in the case of Low Yam Chow (13 Fed. Rep., 605):

"The act of May 6, 1882, was framed in supposed conformity with the provisions of this supplementary treaty. In the inhibitions which it imposes upon the immigration of Chinese there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that Congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese *laborers*. It provides, in express terms, as seen above, that the limitation or suspension shall apply only to them, *other classes not being included in the limitations*."

And in the case of *in re* Ah Lung, 18 Fed. Rep., 28, Mr. Justice Field also says:

"Undoubtedly the courts will always construe legislation in harmony with treaty stipulations *where its sole* purpose is to carry them into effect. It will not be presumed in the absence of clear language to that purport,

that Congress intended to disregard the requirements of a treaty with a foreign government, or to abrogate any of its clauses."

And this court in a later case used the following language:

"The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. Aside from the duty imposed by the Constitution to respect treaty stipulations where they become the subject of judicial proceedings, the court can not be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry, whether the rights secured by such stipulations shall be recognized and protected; and it will be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt for a moment that this construction were possible in the mind of its members when the legislation in question was enacted." (Chew Heong *v.* United States, 112 U. S. 536.)

2. The petitioner maintained below and will maintain here that if the construction of the 6th section of the act of July 6, 1884, contended for by the government, upon the supposed authority of the decision of this court in the case of the Wan Shing *v.* United States is correct, it is tantamount to an absolute prohibition of the return of domiciled Chinese merchants who have left the country for merely temporary purposes of business or pleasure.

This is manifest, because the procurement of the certificate, defined in section 6 of the act, is impossible, or if not impossible at least absolutely impracticable, in the case of persons of the class to which petitioner belongs.

Section 6 of the amendatory restriction act of July 5, 1884, hereinbefore referred to, is as as follows:

"That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to *come* within the United States, and who shall be *about to come* to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a *subject*, in each case to be evidenced by a certificate, issued by such government, which certificate shall be in the English language, and shall show such permission with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, *former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued*, and that he is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant said certificate shall, in addition to above requirements, *state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid:* Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representative of the United States in the foreign country from which said certificate issues or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement

is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate viséd as aforesaid shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district of the United States at which the person named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part *of the person so producing the same* to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

How can the Chinese government in the case of a Chinese merchant who may have resided in the United States for a quarter of a century, and who has departed therefrom on a temporary visit of either business or pleasure, for China, or some other foreign country, with the intention of returning as soon as possible, certify as to the former or present occupation or profession of such person, when and where and how long pursued, and his place of residence; or how can that government certify as to the nature or character, or estimated value of the business carried on by such Chinese merchant in this country; and further, how can the diplomatic or consular representative of the United States, before indorsing such certificate, as required by law, examine into the truth of the statements required to be set forth therein in a case of the character referred to?

Many Chinese merchants, who have been domiciled in this country for many years, and who still remain subjects of China, have branch houses in Victoria, Honolulu, Mexico, and other countries, and are constantly going to and fro on temporary visits for the

purpose of making collections, and attending to their interests in those branch houses.

If they are required to produce the certificate defined in section 6, which is to be issued by the government of which the merchant is a subject, the result would be that a Chinese merchant, who has been domiciled in the United States for a period of thirty years, and who has a large capital invested therein, and who departed therefrom for Victoria or Honolulu for the purpose of attending to his branch business there, with the intention of returning within a month or two, must before he can return to the United States, proceed from Victoria to China, and there attempt to procure a certificate which it is impossible to procure for the reasons hereinbefore stated.

The object of section 6 was not to limit, suspend, or prohibit resident merchants from returning to the United States after a temporary absence, but to provide a means of identifying merchants coming to this country *for the first time*, and this intention is evidenced by the language of the first portion of the section:

"That in order to the faithful execution of the provisions of this act every Chinese person, other than a laborer who may be entitled by said treaty or this act to *come* within the United States, and who shall be *about to come* to the United States," etc.

Congress could not have intended to require such certificates from Chinese persons of the class to which the petitioner belongs, for the further reason stated by Judge Sawyer in his opinion in the case of *Ah Ying* (11 Sawyer, 17), as follows:

"As to those domiciled in foreign countries, there is no ready means in this country for their indentification: In the countries whence they propose to come the means of ascertaining the facts are at hand. *Hence the provision.* As to those resident, or domiciled in this

country, we have ourselves the best means of identification; while, as to many of them even in their native country, and much less when they are temporarily, in other foreign countries, there is no practicable means of either identification or for procuring the certificate prescribed. The United States Statutes do not now, nor have they ever, required, or provided for the issue of any certificate in this country to resident Chinese, other than laborers, who are about to depart, temporarily for business or pleasure, either to China or other foreign countries. There are many Chinese merchants in California, who have been domiciled in the State from twenty to thirty five years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties every time they go to another country to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return."

As before suggested, Congress had no intention to restrict or prohibit the coming to this country of Chinese persons of the exempt class. The sole object was to prohibit or restrict the further immigration to this country of Chinese laborers.

As was said by Mr. Justice Field, in the case of Low Yam Chow, 13 Fed. Rep., 611 (referring to the restriction act of 1882):

"Its purpose will be held to be what the treaty authorized, to put a restriction upon the emigration of laborers, including those skilled in any trade or art, *and not to interfere by excluding Chinese merchants or putting unnecessary and embarrassing restrictions upon their coming* with the commercial relations between China and this country. Commerce with China is of the greatest value, and is constantly increasing. And it should require something stronger than vague inferences to justify a construction which would not be in harmony with that treaty, and which would tend to lessen that commerce."

In the case of Low Yam Chow, the petitioner was a Chinese merchant who had resided in Chili and Panama for a period of fifteen years, and who had never been in the United States. He departed from Panama for San Francisco, and arrived there in the month of August, 1882. He applied to the collector for permission to remain in the United States, on the ground that he was a Chinese merchant, and therefore not within the prohibited class. The collector refused to permit him to land because he failed to produce the certificate mentioned in section 6 of the act. Thereupon he applied to the Circuit Court for a writ of *habeas corpus*, which was granted, and the case was heard before M. Justice Field and Judge Hoffman, the District Judge, who discharged him from custody. In his opinion Mr. Justice Field said:

"The certificate mentioned in this section is evidently designed to facilitate proof by Chinese other than laborers coming from China and desiring to enter the United States, that they are not within the prohibited class. *It is not required as a means of restricting their coming.* To hold that such was its object would be to impute to Congress a purpose to disregard the stipulation of the second article of the new treaty, that they should be allowed to go and come of their own free will and accord. Nor is it required as a means of proving their character from merchants and others not laborers domiciled out of China when the law was passed, and coming here from such foreign jurisdiction. The particulars which the certificate must contain show that it was to be given to those then residing there, for their place of residence in China is to be stated. *Independently of this consideration*, that government could not be expected to give in its certificate the particulars mentioned of persons resident, some perhaps for many years, out of its jurisdiction. Neither the letter nor the spirit of the act called for a construction imputing to Congress the exaction of a condition so unreasonable. The general language of the twelfth section, 'that no Chinese person shall be permitted to enter the United States by land without producing to the proper officer

of customs the certificate required in the act of Chinese persons seeking to land from a vessel,' is to be construed as applying to such persons as are by previous sections prohibited from coming, not as extending the prohibition."

It is true that in the amendment of section 6, in the act of July, 1884, Congress provided that the certificate referred to in section 6 should be the sole evidence permissible *on the part of persons so producing the same*, to establish a right to enter into the United States; but it was not the object of that amendment to make the section applicable to domiciled merchants.

The object of the amendment will be evident from an examination of the decisions construing section 6 of the original act.

After the passage of the act of 1882 the question arose on several occasions, whether the production of the certificate defined in section 6 was absolutely necessary in the case of Chinese persons of the exempt class *coming to this country from China for the first time;* and some of the courts held that inasmuch as the purpose of section 6 was simply to provide a means of identification and not to restrict or prohibit the coming hereto of persons of the exempt class, their status in China as merchants or students might be established by *parol* testimony.

This question was first decided by Judge Deady, of Oregon, in the case of Ho King (14 Fed. Rep., 724), on January 15, 1883. Ho King was a Chinese actor and sought to enter the United States without producing the certificate required by section 6, and Judge Deady, in a very able and exhaustive opinion, decided that the certificate provided for in section 6 of the act of May 6, 1882, was not the only obtainable evidence that a Chinese person was not a laborer, and therefore entitled to come to reside within the United States, but that such

fact might be shown by any other pertinent or convincing testimony.

This decision was acted upon and followed by the various courts upon the Pacific Coast until the adoption of the amendment to section 6 in July, 1884, and it is generally conceded that the sole object of that amendment was to overcome the effect of the decision in the case of Ho King.

If that decision had been permitted to stand, many Chinese persons, who had never been in the country, would have come from China, and claimed to belong to the exempt class, and if their alleged *status* as merchants in China could have been established by *parol* testimony, the Government would have been powerless to controvert their statements, or to show that such persons were *not* what they claimed to be.

Chinese or other foreign certificates are not necessary in cases of merchants domiciled in this country, because, as was observed by Judge Sawyer, in his opinion in the Ah Ping case, "our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity." (11 Sawyer, 20).

4. The question involved in the present case was decided in favor of the contention of petitioner, as early as March 14, 1884, by the Treasury Department of the United States.

In an opinion by Secretary Folger (Treasury Department circular, 6240), it was held "that the right of Chinese, other than laborers, to come into the United States did not depend on the production of any certificate whatever, but that the want of such certificate might be supplied by satisfactory evidence *aliunde*."

It is true that this decision was made prior to the passage of the amendatory restriction act of 1884, but in later rulings by the same department, the decision of Judge Folger was affirmed.

On September 25, 1884, Judge Gresham, then Secretary of the Treasury, in response to an inquiry from the collector of customs at Port Townsend, Washington Territory, as to whether he might issue certificates to departing merchants as a matter of convenience, and for the purpose of identifying them on their return, in the absence of any provision of law therefor, decided (Treasury Department circular, 3358 D) as follows:

"With regard to the certificate devised by you for the identification of returning Chinese merchants, you are informed that in the absence of any provision of law as to the evidence to be required on the re-entry of Chinese merchants no objection is perceived to your furnishing for the convenience of parties and your own protection merchant certificates similar to the certicate provided in section four of the act of July, 1884, as evidence of the right to re-entry of Chinese laborers."

And, again, on December 2, 1884, the Hon. H. F. French, Assistant Secretary of the Treasury, and acting solicitor of the department, decided:

"Persons known or proved to your satisfaction to be Chinese merchants who resided in the United States at the date of the treaty of 1880 are entitled to go from this country and return at pleasure. Certificates of the Chinese consul general at San Francisco may be regarded as *prima facie* evidence in such cases."

The same decision was subsequently made by Secretary McCulloch on December 6, 1884, December 27, 1884, and January 14, 1885.

In the decision of December 27, 1884, Mr. McCulloch says:

"Section 6 of the act of 1884 applies only to Chinese merchants coming for the first time to the United States. Chinese merchants, former residents in the United States, may be admitted on any satisfactory proof of such facts, by certificate or otherwise."

And in the decision of January 14, 1885, he again arrived at the same conclusion:

"Section 6 of the act of 1884 does not apply to Chinese persons other than laborers lawfully in the United States; such persons are by treaty entitled *to come and go of their own free will and accord*; and when they leave the United States are entitled to reenter on any evidence satisfactory to the collector that they are not Chinese laborers."

The question next arose in the Circuit Court of the United States for the District of California, on April 9, 1885, before Judge Sawyer, Circuit Judge, and Judge Sabin, District Judge of Nevada, in the case of Ah Ping, above referred to, and the rulings of the Treasury Department were approved.

The question was afterwards mooted in the Treasury Department on November 8, 1888, and the Hon. J. H. Maynard, Assistant Secretary of the Treasury, held as follows:

"Chinese merchants are not affected by the exclusion act of the 1st ultimo, and those now resident in the United States who visit foreign countries may be admitted on their return upon any evidence of their identity satisfactory to the collector as prescribed in paragraph 6, decision 6722."

The same question subsequently arose in the Treasury Department on July 3, 1890, when acting Secretary Batcheler decided as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by any existing laws or treaty from returning to the United States after visiting China or elsewhere. No certificates or other papers, however, are issued by the department or by any of the special officers to show that they are entitled to land in the United States; but it is suggested that such persons should, before leaving the United States, provide themselves with such cer-

tificates of identity as may be deemed proper showing that they have been residents of the United States, and that they are not laborers, so that they can present the same to, and be identified by, the collector of customs at the port where they may return."

The reasoning of Judge Sawyer in the case of Ah Ping, cited *supra*, is so perfect that we quote from the opinion, for the convenience of the court, the following passages:

"The question at issue depends upon a construction of the clause of section 6: '*Every Chinese person*, other than a laborer, who may be entitled by said treaty or this act, *to come* within the United States, and who shall be *about to come* to the United States,' shall obtain the permission of and be identified as so entitled in the mode provided. This with the clause in the same section, making the certificate the sole evidence as to those to whom it is applicable, is the only provision, either in the treaties in force or the act, putting any limitation upon the right of a Chinese merchant to come and go of his own free will, without any limitation or legal obstruction. The only equivocal words in the clause, taken literally would seem to be, 'who shall be about to come to the United States.' Does this phrase mean persons residing, or domiciled abroad, who leave their residence, or domicile, 'to come to the United States' either for travel or pleasure, or to take up their residence here, or for other purposes; or does it, also, include Chinese subjects already domiciled in the United States having their residence and business here, and who left the country temporarily, before, or who shall leave it after the passage of the act, for temporary purposes, with the intention of returning after the accomplishment of such purposes, to their residence in the United States? We are satisfied, upon the rules of construction and principles established by the Supreme Court of the United States, in Chew Heong *v.* United States (112 U. S., 536), decided at the present term of the Court that this provision should be so construed as not to embrace the latter class. To give the section any other construction,

would be to bring the act into direct conflict with the treaty, which the Supreme Court says should not be done, if such a construction can be avoided. The object of the act is, undoubtedly to prevent the increase in this country of the number of Chinese laborers, and this provision is designed to furnish means for readily identifying parties entitled to enter the United States.

"As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand. Hence the provision. As to those resident, or domiciled in this country, we have ourselves the best means of identification; while, as to many of them even in their native country, and much less when they are temporarily in other foreign countries, there is no practical means of either identification, or for procuring the certificate prescribed.

"The United States Statutes do not now, nor have they ever, required or provided for the issue of any certificates in this country to resident Chinese, other than laborers, who are about to depart, temporarily for business or pleasure either to China, or other foreign countries. There are many Chinese merchants in California, who have been domiciled in the State from twenty to thirty-five years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return.

"The treaty between the United States and China of 1868, commonly called the Burlingame Treaty, guarantees to Chinese subjects the right without any conditions or restrictions to come, remain in, and leave the United States, and to enjoy all the privileges, immunities, and exemptions enjoyed by the citizens and subjects of the most favored nation (16 Stat., 740). The treaty of November 17, 1880, puts no limitation upon this right, and does not authorize, expressly or by implication, any legislation of Congress putting any limitation upon the rights of Chinese other than 'Chinese laborers.' The language of the treaty is: 'The limitation or suspen-

sion shall be reasonable, and shall apply *only* to Chinese who may *go* to the *United States as laborers, other classes not being included in the limitations.*' (22 R. S., 826.) On the contrary, articles two and three of the latest treaty in express terms guarantees that all Chinese of any class 'now either permanently or temporarily residing in the territory of the United States shall be secured the same rights, privileges, immunities, and exemptions as are enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by the treaty.' There is nothing, therefore, in any of the treaties that, expressly or by implication, authorizes Congress to put any restriction upon the right to come and go of such parties, while in other respects they are expressly placed upon the footing of all other most favored foreigners. If, then, there is anything in the restriction act that puts a limit upon these rights, such limitation is a direct violation of the express provisions of the several treaties with China now in force. While such a provision in an act of Congress would undoubtedly repeal the conflicting provisions of the treaties, as we have always heretofore held, yet, under the late decision of the Supreme Court, courts should, if possible, so construe the act of Congress as not to bring it into conflict with treaty stipulations. Upon the principles established in the case cited, we are satisfied that the act can be fairly construed so as not to include this case. Section one provides, in explicit terms, the literal meaning of which can not well be misunderstood, that 'during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain in the United States.' And section two makes it an offense for the master of any vessel to 'knowingly bring within the United States on such vessel and land, or attempt to land, or permit to be landed *any Chinese laborer* from any foreign port or place.' This language without the limitation put upon it by the provisions of section three, that it shall not apply to persons within the United States at the date of the treaty, is as broad and specific as it is possible to be, and literally construed included every individual laborer of the Chinese race. Yet the Supreme Court, after quoting those provisions of sections one and two, explicitly

says in substance that if they *had stood alone, without the limiting clause of section three*, its construction of the act would be the same as it is now. The exact language of the court, speaking through Mr. Justice Harlan, is: '*If these sections constituted the entire legislation in reference to the coming to this country of Chinese laborers, the court, under the established rules for the interpretation of statutes would hold that they did not apply to Chinese laborers, who, by their residence in the United States, at the date of the last treaty, had acquired the right to go and come of their own free will, and to enjoy such privileges, immunities, and exemptions as were accorded here to citizens and subjects of the most favored nation.* For since the purpose avowed in the act, was, to faithfully execute the treaty, any interpretation of its provisions would be rejected, which imputes to Congress an intention to disregard the plighted faith of the government, and consequently the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said in the case supposed would be that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure.'

"This language, it is true, goes farther than was absolutely necessary under the facts of that case; but it is the deliberate statement that the court would have so held had the facts required it. Such a deliberate announcement made, under the circumstances of the case, we cannot regard as a mere dictum or the expression of the individual opinion of the judge delivering the judgment. We look upon it as binding upon this court as a rule of decision. The court simply applies the universally recognized rule, that the repeal of a statute or treaty by implication is not favored. In this case, the clause of section 6, under consideration, is less specific, as the words, 'who shall be about to come into the United States,' are more ambiguous, and are fairly open to the construction upon the language itself, in

view of the surrounding circumstances, that they are only applicable to those coming for the first time, or to persons having no present domicile or residence in the United States, but having their actual residence or domicile in a foreign country about to come into the United States, either on business, for travel, or as temporary or permanent residents.

"At the time the petitioner left his residence in San Francisco for British Columbia on the business of his firm, both under the treaties and under the laws of the United States, then in force, he had a legal right to return without any conditions or restrictions, not applicable to subjects of any other, or 'the most favored nation.' He had no reason to anticipate any change of the law. At his departure he had a vested right under the treaties and laws then in full force to return. He had a right to rely on the laws as they then were. If, by the act in question, it was intended to cut off this right of return, then it was the deliberate intention of Congress to violate the treaty and cut off a right vested in the petitioner, both by the treaties and other laws of the land. As we have seen the act must, if possible, be so construed as not to work this wrong. The Supreme Court, in support of the construction given to the act in the case cited, further observes: 'To these (reasons) may be added the further one, that courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature.' To give the construction insisted on by the United States Attorney would be to give the act a retrospective operation, which would injuriously affect the right of the petitioner to return, vested under the treaties and laws in force at the time of his departure for temporary purposes to British Columbia. And as we have seen, there is less ground for holding that the petitioner is included within the purview of the act, than in the case decided by the Supreme Court, upon the hypothesis assumed in the paragraphs quoted from the decision.

"The following language of the Supreme Court in

Chew Heong's case is equally applicable to the petitioner in this case: 'It is also said, in support of the judgment, that the sixth section is significant, in that it prescribes the mode for the coming to this country of Chinese persons, other than a laborer who may be entitled by said treaty and this act to come within the United States,' *but fails to provide the means for the return and identification of Chinese laborers who were entitled by the treaty to return, but who were out of the country when the act of Congress was passed.* But this argument, like the one just alluded to, *only proves that Congress while making provision for the coming of persons, who were entitled to come, other than laborers, omitted to make special provision in reference to the latter, and consequently left them to stand upon their rights as secured by the treaty, and if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belong to the class entitled to go and come.*

With as good reason may it be said that Congress, while providing for the case of Chinese other than laborers, domiciled in foreign countries, not residents of the United States, and having no vested right to return as present residents of the United States, temporarily absent on business or pleasure, who shall be about to come to the United States, omitted to make any special provision in reference to Chinese residents of the United States, temporarily absent with a right to return at the date of the passage of the act or who after the passage of the act temporarily leave the United States for foreign countries on business or pleasure, 'and consequently left them to stand upon their rights as secured by the treaty, and, if their right to enter the United States was questioned, to prove in some way consistent with the general principles of law that they belong to the class entitled to go and come.'

If we have interpreted the principles established by the Supreme Court aright, the result is that section six of the restriction act is not applicable to Chinese subjects, residents of the United States who left the United States for foreign countries for temporary purposes, intending to return before the passage of the amendatory restriction act, having a right to return at the time of

their departure, and, who did not return till after the passage of the act ; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure, since the passage of the act. This is the construction acted upon by the executive department of the government, and, we think, is fully justified in these particulars by the decision of the Supreme Court."

5. It is a well settled principle that laws will not be so construed as to require the performance of impracticable or impossible conditions, and the courts have held that where a statute imposes as a condition precedent to the exercise of a right, an act, the performance of which is impossible, so much of the statute as imposes such condition, is void.

Judge Sawyer, in the prior resident laborer's case, said :

"The necessity to produce a certificate and the right to have it in order that it may be produced are co-relative conditions. The one provision is the complement of the other. They are reciprocal and must go together. The obligation to produce the certificate presupposes the practicability or at least the possibility of procuring it in order that it may be produced. The two provisions go together and form but one legal conception. The obligation to produce and the right and ability to obtain it are dependent and not independent conditions. One is the counterpart of the other, and it is not to be supposed that Congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms—if, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers, or if intended, it must be void "

*In re* Leong Yick Dew, 2 West Coast Rep., 83.

6. At the time of the passage of the Exclusion Act, in 1888, the entire Chinese question, including the

rights of persons of the exempt class, laborers, and persons in transit through the country, was before Congress, and was considered by it, as will appear by an act passed September 13, 1888 (25 U. S. Stats., 476), which act was to become effective only in the event of the ratification of a new treaty between the two Governments.

Congress is presumed to have been aware of the settled construction which had been given to Sec. 6 of the Act of 1884 for a period of over four years, and its failure to prescribe new rules as to Chinese merchants domiciled in this country, is a distinct legislative approval of such construction.

SECOND.

*The question upon the just construction of the Chinese Restriction Acts, involved in the case of the petitioner, in the Circuit Court of Appeals, was not before this Court, and was not adjudged by it, in the Wan Shing case.*

1. The case of *Wan Shing* v. *United States* was one of the "*Chinese Exclusion cases*," before the Court at the last term; and Mr. Justice Field, delivering the Opinion of the Court, states that the man's detention was based upon the Exclusion Act of October 1, 1888.

After hearing the testimony of Wan Shing, and that of one other person, the Commissioner promptly said: "I will recommend his remand. *I do not see that he ever came within the class excepted from the provisions of the Exclusion Act.*"

According to his own story, on the stand, he was about *sixteen* years old when he first came to the country; he was here only *two* years; and he returned, at the age of *twenty-six*, after an *absence of seven years in China*. He was thus *eighteen* years old, when he went

back to China; and the petition actually parades *this 18-years old boy as a merchant.*

He said that his father had an interest, amounting to $1,000, in some dry-goods store in California; that *he* had no interest, and never had any, in that store; and that when he was *first* here, at 16 years of age, his *work* was to "*help the book-keeper write the bills, and make the bills sometimes in Chinese.*"

Thus, as far as the man's *status* was disclosed, he was, in fact and in law, a *laborer;* and upon any claim of right to enter the United States, in 1889, in the character of a *Chinese merchant*, he was bound to produce a certificate of identity under the authority of the Chinese Government.

But even if the man had proved that before he left the United States, for China, he in fact resided and did business here as a Chinese *merchant*, it would have been equally necessary for him to produce the certificate required by Sec. 6 of the Act of 1882, as amended in 1884, to entitle him to enter the country.

It could not have been maintained that his absence from the country for *seven* years, after living here *two* years, constituted a *temporary* absence, during which he retained a legal domicile, or residence, in the United States, and that he was entitled to come back to the country without producing the certificate mentioned.

If the proof had been ever so clear that he was in fact a merchant before he left the United States, in 1882, the Act would have been applicable to him, upon his return in 1889, and a Chinese certificate would have constituted the only evidence permissible to establish his right to enter the country.

It is clear, therefore, that whether he *was, or was not, a merchant*, before he went back to China, in 1882, the Act was applicable to him, and he was required, on coming here, in 1889, to procure and produce the certificate for which it provides.

Upon this state of facts, it was plainly unnecessary for the Court to examine the evidence to show that Wan Shing was a merchant, for conceding that he was a merchant, as pretended, it conclusively appeared, as matter of law, that he had no right to enter without producing a Chinese certificate, or accounting for its absence.

We do not understand that the Court intended to say anything else, or anything more than this, in its opinion.

When Wan Shing went back to China, in 1882, after living here two years as a laborer, he left behind him no business, no property, no establishment, no interests of any kind or description, and he could not be admitted, after seven years' absence in China, in the character of a *Chinese merchant*, without a Chinese certificate.

The statute, in *his* case, made the required certificate the *only* evidence permissible to establish *his* right to enter the United States.

Chief Justice Marshall, in Cohen *v.* Virginia (6 Wh., 264) remarks:

"It is a maxim not to be disregarded that general expressions, in *every* opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in any subsequent suit when the *very point is presented for decision.* The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may seem to illustrate it, are considered in their relations to the case decided, but their possible bearing on other cases is seldom completely investigated."

2. There was no state of facts whatever before this Court, in the Wan Shing case, which required it to decide, or consider, even for a moment, the grave question discussed by Judge Sawyer in the *Ah Ping* case,

as to the application of the Restriction Acts to Chinese merchants domiciled in the United States, who temporarily leave the country for necessary purposes of business, or pleasure, *animo revertendi.*

The Court had no occasion in deciding that case to approve or disapprove of the great argument, founded on treaty stipulations, and international obligations, by which it was held by the Circuit Court in California, and by the Executive Department, that the Restriction Legislation could not be so construed as to apply to that class of Chinese subjects, who had become domiciled merchants in the United States, in their occasional and temporary journeyings in the prosecution of their business, or in the pursuit of their pleasure.

If that argument had been presented to the Court, in the Wan Shing case, it would have been ignored, as an impertinent intrusion upon the time and patience of the Court, as it could have no possible application to the subject-matter involved in the case.

It cannot be supposed, therefore, that this court intended to adjudge, as against the construction which has been put upon the Restriction Acts, that Chinese persons, having the established *status* of domiciled merchants in the United States, and temporarily and necessarily absent from their homes, are included in the acts, and must be banished from the country, when they return, for the want of papers which may not be procurable by them in a foreign country.

The question as to the application of those Acts to the class of Chinese subjects to which the petitioner belongs cannot be deemed concluded, therefore, by the authority of the Wan Shing case, and the authority of the judgment, in that case, must necessarily be confined to the question presented by the facts therein for the determination of the court.

It is clear, therefore, as we submit, that the Circuit

Court of Appeals misunderstood the proper scope of the authority of the judgment in that case, and gave to that judgment an application and an effect which were not intended by the court, or by the distinguished Judge who spoke for it on that occasion.

THIRD.

*If the judgment in the case of Wan Shing* v. *United States can be deemed to be broader than the question before the court, in that case, and to embrace the question presented, by the record, in the case of the petitioner, he should have an opportunity to be heard upon the question involved in his case, before he shall be transported to China, under the decision of the inferior Appellate Court.*

1. The question is a momentous one to this petitioner, as upon it would seem to depend the fate of all he has in the world after a long business residence in the United States.

By the recent Judiciary Act he has no right of appeal to this Supreme Court of the Constitution from the judgment, practically of banishment from the country, pronounced against him by an inferior court of the United States, composed of two District Judges, in a case involving the question of the just adjustment of the legislative action to the treaty obligations of the Government of the United States; but this court fortunately has the power to bring that judgment before it for its review and determination.

2. The question upon which the validity of that judgment depends, if considered at all by this Court, in the case referred to, was not discussed before the Court in that case, which was in effect abandoned by the party who took the appeal.

Before the judgment in that case shall be allowed to have effect as the authority of this high Court, for the removal of the petitioner, it is respectfully submitted that the Court should permit the petitioner to be heard, by his counsel, upon the question of the just construction of the Restriction Acts, in his case, and for that purpose should grant the present application.

J. Hubley Ashton and
Thomas D. Riordan,
*Counsel for Petitioner.*

# United States Circuit Court of Appeals,

FOR THE 9TH CIRCUIT,

OCTOBER TERM, 1891.

*No. 12.*

LAU OW BEW, APPELLANT,

*vs.*

UNITED STATES, RESPONDENT.

# TRANSCRIPT OF RECORD,

(On Appeal from the Circuit Court of the United States for the Northern District of California).

1 IN THE

# Circuit Court of the United States.

NORTHERN DISTRICT OF CALIFORNIA.

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2 IN THE MATTER OF LAU OW BEW, ON HABEAS CORPUS.

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*To the Hon. Lorenzo Sawyer, Judge of the Circuit Court of the United States, Northern District of California:*

The petition of Lou Chung respectfully shows:

That Lau Ow Bew is unlawfully imprisoned, detained, confined, and restrained of his liberty by Captain Smith, Master of the steamship *Oceanic*, in the City and County of San Francisco, State of California, Northern District of California.

3 That the said imprisonment, detention, confinement, and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by said Master that said passenger is a subject of the Emperor of China, and must not and cannot be allowed to land under the provisions of section 6 of the Act of Congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," as amended by the Act of July 5, 1884.

That said passenger does not come within the restrictions of said Acts, but, on the contrary, your petitioner alleges:

That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein:

That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the City of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

4 That said firm is worth $40,000.00, and said passenger has a one-fourth interest therein, in addition to other properties.

That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports.

That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the Steamship *Oceanic* on the 11th day of August, A. D. 1891.

That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said

5 proofs, and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884.

That the reason the said passenger failed to procure said certificate so required as aforesaid by the said section 6 of said Act is, that the Chinese government could not issue said certificate, because they could not ascertain, as required by said law, the nature and character of the business carried on by said petitioner, where and how long carried on, and estimated value thereof, nor

could the United States Consul visé said certificate as required by law, because he could not ascer-
6 tain the truth of the facts which might be set forth therein.

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted direct to the said Master, commanding him to have the body of said passenger before your Honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor concerning him, together with the time and cause of his detention and said writ; and that he may be restored to his liberty.

Dated on the 14th day of August, 1891.

LOU CHUNG, Petitioner.

HARVEY S. BROWN, and
THOS. D. RIORDAN,
Attorneys for Petnr.

7 STATE OF CALIFORNIA,
*City and County of San Francisco,*
Northern District of Calfornia,
United States of America. } *ss.*

Lou Chung, being duly sworn, says that he is the petitioner above named, and that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge.

LOU CHUNG.

Subscribed and sworn to before me this 14th day of August, A. D. 1891.

F. D. MONCKTON,
Commissioner of the Circuit Court of the United States for the Northern District of California.

Let the writ of *habeas corpus* issue pursuant to
8 the prayer of the petition, returnable on August 15, 1891. And when the within named petitioner

is produced, let him be admitted to bail in the sum of $1,500.

JAMES H. BEATTY, Judge.

[ENDORSED:] Filed August 14, 1891.
L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus.*

*The President of the United States of America, to Captain Smith, Master of the Steamer Oceanic, greeting:*

You are hereby commanded that you have the
9 body of Lau Ow Bew by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the Honorable the Circuit Court of the United States for the Northern District of California, at the Court-room of said Court, in the city and county of San Francisco, California, on or before the 15th day of August, 1891, or in case the steamer on which said petitioner is detained has not cleared on that day, as soon as practicable after clearance, but before the departure of the steamer, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

10 I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States for the Northern District of California, do hereby certify the foregoing to be a true copy of the writ of *habeas corpus* issued in the within-entitled matter.

Attest my hand and seal of said Circuit Court, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

I hereby certify that on the 14th day of August, 1891, I received the writ of which the within is a copy, and that on the 14th day of August, 1891, at San Francisco, in this district, I personally served the said writ by delivering to and leaving the same with Captain Smith, of the steamship *Oceanic*.

Dated San Francisco, Cal., August, 1891.

11 W. G. LONG, U. S. Marshal.

By J. T. GREY, Deputy Marshal.

[ENDORSED:] Filed on return this 15th day of August, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*.

*The President of the United States of America to Captain Smith, Master of the Steamship Oceanic, greeting:*

You are hereby commanded that you have the body of Lau Ow Bew by you imprisoned and detained, as it is said, together with the time and cause of such

12 imprisonment and detention, by whatsoever name he shall be called or charged, before the Honorable the Circuit Court of the United States for the Northern District of California, at the Court room of said Court, in the city and county of San Francisco, California, on or before the 15th day of August, 1891, or in case the steamer on which said petitioner is detained has not cleared on that day, as soon as practicable after clearance, but before the departure of the steamer, to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of August, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

In obedience to the within writ, I hereby produce the body of Lau Ow Bew, as within directed, and
13 return that I hold him in my custody by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese Restriction Act.

G. LOSSINS, For Captain Steamship Oceanic.

San Francisco, 14-8, 1891.

[ENDORSED :] Filed on return this 15th day of August, 1891.

L. S. B. SAWYER, Clerk.

**United States Circuit Court, Northern District of California.**

*In re* LAU OW BEW on *Habeas Corpus.* No. 11415.

*To the Honorable Lorenzo Sawyer, Judge :*

And now comes Charles A. Garter, United
14 States Attorney for the Northern District of California, and asks for leave to intervene for and behalf of the United States, in the matter of the application made on behalf of the person first above mentioned, for a writ of *habeas corpus*, and respectfully makes opposition to the said writ, and for grounds of intervention states as follows : That as he is informed and believes, the said person in whose behalf said application was made, has been and now is lawfully detained by the master of the Steamship *Oceanic* now in the Port of San Francisco, Northern District of California, in compliance with the provisions of an Act of Congress of

the United States, entitled "An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, and the Act amendatory thereof, approved July 5, 1884, for the following reasons :

First. That the said person, in whose behalf
15 said application was made, is by race, language, color, and dress a Chinese person.

Second. That the said person, in whose behalf said application was made, arrived at the Port of San Francisco as a passenger on said vessel from Hong Kong, a foreign port or place in the Empire of China, and has failed to produce to the Collector of Customs for the Port of San Francisco, California, or to any other officer authorized by law, the certificate of identification by said Acts of Congress required.

Third. Intervenor denies, upon information and belief, that the said person, in whose behalf said application was made, is entitled to land in the United States, as is alleged in said application, or otherwise.

Wherefore, the said United States Attorney asks that a judgment and order of this Honorable Court be made and entered in accordance with the allegations herein contained, and directing that the said person first above mentioned be detained on board of said vessel until released, as provided by law or otherwise, to be returned to the country from whence he came, and that
16 such further order be made as to the court may seem proper and legal in the premises.

CHAS. A. GARTER, United States Attorney.

[ENDORSED:] Filed Aug. 15, 1891.

L. S. B. SAWYER, Clerk.

**United States Circuit Court, Northern District of California.**

*In re* LAU OW BEW on *Habeas Corpus.*

*Traverse to Return.*

The petitioner herein, in answer to the return
17 of the master and the intervention filed herein on behalf of the United States, makes the following denials and allegations:

1st. That at the time of the granting of the writ herein the said Lau Ow Bew was imprisoned, detained, confined and restrained of his liberty on the Steamship *Oceanic*, by Captain Smith, Master of the Steamship *Oceanic*, in the city and county of San Francisco, State of California, Northern District of California.

That the said imprisonment, detention, confinement and restraint was illegal, and the illegality thereof consisted in this, to wit:

That it was claimed by the said master, that said passenger is a subject of the Emperor of China, and should not be allowed to land under the provisions of section 6, of the Act of Congress of May 6th, 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese," as amended by the Act of
18 July 5th, 1884.

That the said passenger does not come within the restrictions of said Acts, but on the contrary, your petitioner alleges

2nd. That the said Lau Ow Bew is now on board the Steamship *Oceanic*, which arrived in the port of San Francisco, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof;

3d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein;

4th. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.;

5th. That the said firm is worth $40,000.00 and said passenger has a one-fourth interest therein in addition to other properties;

19 6th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money amounting to many thousands of dollars as duties upon imports;

7th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the Steamship *Oceanic* on the 11th day of August, A. D. 1891;

8th. That at the time of his departure, he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to per-

20 mit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese Government, mentioned in section 6 of the Chinese Restriction Act of May 6th, 1882, as amended by the act of July 5th, 1884;

9th. That the reason the said passenger failed to procure said certificate so required as aforesaid by the said section 6 of the said Act is that the Chinese Government could not issue said certificate because they could not ascertain as required by said law the nature and character of the business carried on by said peti-

tioner, where and how long carried on, and the estimated value thereof, nor could the United States Consul vise said certificate as required by law because he could not ascertain the truth of the facts which be set forth therein.

LOU CHUNG, Petitioner.

21 Subscribed and sworn to before me this 24th day of August, A. D. 1891.

[SEAL.] R. M. EDWARDS, Notary Public.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 24th day of August, 1891.

W. G. WITTER, Asst. U. S. Atty.

**In the Circuit Court of the United States, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11415.

This matter having been regularly brought on for hearing before the Court and Judge thereof, the United States Attorney having appeared and intervened
22 on behalf of the United States, and the same having been duly heard and submitted and due consideration thereon had, it is by the court now here considered:

That Lau Ow Bew, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty as therein alleged.

It is further adjudged and found that he came from China by the steamship *Oceanic*, and is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein:

It is therefore ordered that the said Lau Ow Bew be remanded by the United States Marshal for the Northern

District of California to the custody whence he was taken, to wit, on board the said steamship to the custody of the master of said steamship, or in case of a change of master, to the custody of the master thereof,
23 whoever he may be at the time of this order of remand, or to place him in the hands and charge of any party on board said steamship for the time being representing the master or then in charge of said steamship in the absence of the master, or for the time being exercising control or authority thereon; this order to be executed as to said steamship, whether still in port, not having departed therefrom, or having departed and retnrned since the proceedings herein were instituted. And in case said steamship has departed and not returned, or for any other reason the said Lau Ow Bew can not be placed on said steamship, that the said Marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came.

And for the purpose of carrying this order into
24 effect, it is further ordered that the said Marshal take the said Lau Ow Bew into custody and him safely keep till said order shall be fully executed.

Entered this 14th day of September, 1891.

L. S. B. SAWYER, Clerk.

I, L. S. B. Sawyer, clerk of the Circuit Court of the United States for the Northern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment of Remand, entered in said Court in the within entitled matter.

Attest my hand and seal of said Circuit Court this 14th day of September, A. D. 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

[ENDORSED:] Filed September 14, 1891.

L. S. B. SAWYER, Clerk.

I, L. S. B. Sawyer, clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the therein entitled matter.

Attest my hand and the seal of said Circuit Court this 14th day of September, 1891.

[SEAL.] L. S. B. SAWYER, Clerk.

[ENDORSED:] Judgment Roll filed September 14, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States for the Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus.*

*Statement of Facts.*

It is hereby stipulated and agreed that the following are the facts herein:

1st. That the said Lau Ow Bew is now on board the SS. *Oceanic*, which arrived in the port of San Franciso, State of California, on the 11th day of August, A. D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

5th. That said firm does a business annually of $100,000, and pays annually to the United States Government large sums of money, amounting to many thousands of dollars, as duties upon imports.

6th. That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship *Oceanic* on the 11th day of August, A. D. 1891.

7th. That at the time of his departure he procured satisfactory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the Collector of the Port of San Francisco, but said Collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese Government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884.

28

CHARLES A. GARTER, U. S. District Attorney.
HARVEY S. BROWN and THOS. D. RIORDAN,
Attys. for Petitioner.

[ENDORSED]: Filed August 15, 1891.
L. S. B. SAWYER, Clerk.

29

**In the U. S. Circuit Court for the Northern District of California.**

*In re* LAU OW BEW. September 14, 1891.

*Chinese Restriction Act. Merchant's Certificate of Identity.*—Under the act of Congress of 1882, as amended by that of July 5, 1884, providing that

Chinese persons other than laborers, who are about coming to this country, must procure from the Government which they are about leaving a certificate of their occupation; all Chinese merchants, whether coming for the first time or having before lived here and returning after a temporary absence, must, before they can be admitted, procure such certificate.

*Habeas Corpus.*

THOS. D. RIORDAN and HARVEY S. BROWN,
For Petitioner.

CHARLES A. GARTER, U. S. District Attorney,
for Respondent.

BEATTY, J.—The petitioner is a subject of the Emperor of China, whence he arrived at the port of San Francisco on the 11th day of August, 1891. The master of the vessel on which he came having refused to land him, a writ of *habeas corpus* was issued in his behalf, and in answer thereto it is alleged that the cause of his detention upon such vessel is, that he had not procured from the Government of China the certificate required by the Act of Congress. From an agreed statement of facts it appears that the petitioner for the past seventeen years has been a merchant and a member of a prominent Chinese mercantile firm of Portland, Or., where he has during that time resided. That on September 30, 1890, he went to China, intending shortly to return to this country and to his business, which he did on said 11th day of August, and without procuring from the Chinese Government the certificate required by the Act named.

The only question for determination is, whether a Chinese person who, having been domiciled in this country as a merchant, and temporarily leaving it, can re-enter without such certificate. In consequence of the indefinite legislation and the incompatible adjudi-

ration by other courts upon this subject, it is not one of easy solution. To briefly review both may not be inopportune.

It was provided by the Treaty of 1868, between this country and that of China, that *all* Chinese subjects should be permitted freely to come and reside here, and by that of November 17, 1880, by Article I, that the United States might *regulate*, *limit*, or *suspend* the coming here of Chinese *laborers;* but it was expressly provided that *such limitations* and *suspensions* should

"apply only to Chinese who may come here as
32 "laborers, other classes not being included in the
"limitations." By Article II—That "Chinese * * * proceeding to the United States as teachers, "students, *merchants* * * * shall be allowed to go "and come of their own free will and accord, and shall "be accorded all the rights, privileges, immunities, and "exemptions which are accorded to the citizens and "subjects of the most favored nation;" and by Article III—That any Chinese then resident here shall be protected in the enjoyment of the same rights * * * enjoyed by citizens of the most favored nations.

As to all Chinese *merchants*, whether resident in the United States or China, it is evident they have, by these treaties, the right to come and go as they will, and if under them this Government can adopt regulations to govern such coming and going they must be such as are not inconsistent with the enjoyment of such right.
33 The Government has, however, adopted such regulations as is conceded it may, even in violation of its treaties, and it did provide by section 6, Act of May 6, 1882, 22 Stat., 60, "that in order *to the faithful execution of Article I and II of the treaty*" of 1880, "every Chinese person other than laborers * * * "*who shall be about to come* to the United States shall "be identified as so entitled * * * by the Chinese

"Government," a certificate shall be issued to him, stating, among other things, "*his place of residence in* "*China*, * * * such certificates shall be "*prima* "*facie evidence* of the facts" stated in it.

*In re* Low Yam Choo, 13 Fed., 605, decided September 5, 1882, it was held that Chinese merchants resident of other countries than China who were about to come here were not required to procure such certificate. In the course of the opinion it was stated that the object of requiring such certificate was to furnish the evidence that the Chinese person desiring to come was not
34 a laborer; that to hold that its object was in any way to prevent Chinese merchants from coming "would be to impute to Congress a purpose to disregard "the stipulations of the second article of the new treaty, "that they should be allowed to go and come of their "own free will and accord," and that the "Government "(Chinese) could not be expected to give in its certifi- "cate the particulars mentioned of persons resident— "some perhaps for many years out of its jurisdiction."

Following this decision said section 6 was so amended by Act of July 5, 1884, 25 Stats., 476, that every Chinese person other than a laborer, who is entitled "*and who* "*shall be about to come to the United States*," shall obtain the required certificate of the government of which he may then be a subject, and from which he is about to come. The certificate shall state * * * the former and present occupation or profession, when and
35 where, and how long pursued, and place of residence. * * * If the person is a merchant, said certificate shall * * * state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application. The facts shall also be investigated by the representatives of the United States at such place, by whom such certificates shall be *vised*, and it is further provided that it

shall be *prima facie* evidence of the facts in it stated "*and shall be the sole evidence permissible on the part of the person*" asking to be admitted.

After the change in the law came the decision *in re* Ah Ping, by the learned Judge of this circuit, holding that a Chinese merchant who temporarily left this country could return without procuring such certificate.

Most forcibly was it argued that the Act did not
36 apply to those who had long been domiciled and transacting business here, but only to those merchants who were for the first time about to come to this country. That as to the latter class the government which they were about to leave would have the facts and *data* from which to make the required certificate, but as to the other class such foreign government, not knowing the facts, could not make the certificate.

It would seem almost impossible, at least it is impracticable, to literally enforce the Act without working injustice to those Chinese merchants who have so long resided here as to have lost their identity in China. On such returning to that country temporarily it can not be known there what their occupation is. It results that either that government must issue the certificate and our representatives then indorse it, without any knowledge of the facts or matters therein stated, or that the merchant, entitled under the laws and treaties to a residence here, is debarred from returning; while
37 the Chinese merchant who has never been here can readily procure the certificate and come. It can scarcely be that the law was designed in its operation to prevent the return of those merchants who had long resided here and admit those who had never been in the country, and yet such may be the frequent result if the letter of the law is followed. This seems a harsh interpretation of the Act, and one that may often operate as a violation of the absolute and distinct provisions of

the treaties, whereas both Acts of Congress referred to expressly declare their enactment is in pursuance of and to carry out such treaties.

In Chew Heong *v.* United States, 112 U. S., 536, a Chinese laborer who, by said treaty being entitled to a residence here, left here during the passage of the Act, and hence without procuring on leaving, the certificate required for laborers, and on his attempt
38 to return was refused a landing. While the law required all laborers who had lived here and had left and desired to re-enter to have such certificate, and provided that it should be the *only evidence of their right to return*, the Supreme Court held that it was absurd to maintain that those Chinese laborers who left when no certificate was required could not be admitted upon their return, after the passage of the Act, without one; and that the law should be consistently construed according to its spirit, and not letter, and in such way as to carry out the intent of Congress, which was to sustain the treaties, and not to violate them.

It should also be noted that the Treasury Department has generally construed the Act to permit the return, without such certificate, of merchants domiciled here who may have been temporarily absent.

If the foregoing authorities and rulings were the only guide I should not hesitate to adopt them as the law for this case; but the Supreme Court, in the very
39 recent case of Wan Shing *vs.* The United States, has adopted a contrary view. In that case the petitioner claimed to have been a merchant in San Francisco, which place he left in 1882 for a temporary residence in China, and returned to San Francisco in 1889, without having procured, before leaving China, such certificate, which the Court held was essential to his admission. Against the force of this decision it is now urged that what is in it, which might affect this

case, is mere *obiter dictum;* that the only question involved was whether the testimony was sufficient to establish the petitioner's character as a merchant ; and whether he could land without such certificate, was not an issue, and that in so far as this last question was decided, it was without consideration and more the result of inadvertence than of deliberation.

If such were the case, in view of the other rulings cited above, this last case might be considered as not a controlling one. The opinion says the refusal
40 to land the petitioner was based, not upon the Acts of 1882 and 1884, but upon that of 1888, which prohibits all Chinese laborers from now coming to the United States, and that "the petitioner, if a "laborer, could not have been permitted to land. * "* * *His right to land, therefore, rested upon his es-* "*tablishing the fact that he was not a laborer within the* "*provisions of the Act of October 1, 1888, and that could* "*only have been shown by a certificate of identity, issued* "*under the authority of the Chinese Government.*"

The opinion then proceeds to quote from said Section 6, enacted in 1882 and amended in 1884, especially as emphasizing the clause which directs that said certificate "*shall be the sole evidence permissible on the part* "*of the person so procuring the same to establish a right* "*of entry into the United States.*" It then declares : "This clause disposes of the case before us. No cer-
"tificate was presented by the petitioner, under
41 "the statute, showing that he was entitled to "enter the United States, *nor was any attempt* "*made to account for its absence.*" Had the decision concluded here this last clause would justify the view that such certificate is not always necessary, but when a sufficient reason appears for its absence, other evidence may be substituted. But it is further added : "The evidence offered to show that the petitioner was

"a merchant, was weak and unsatisfactory, *but the* "*statute itself does away with the necessity for any in-* "*vestigation by the Court as to its sufficiency, for it de-* "*clares that while the certificate may be contradicted by* "*the authorities of the United States*, and it is to be "taken by them only as *prima facie* evidence, *it shall* "*constitute the only evidence permissible on the part of* "*the person producing the same to establish his right to* "*enter the United States.*" And in the concluding clause of the opinion the Court reiterates the same view.

42

It is true the Court did not, at any great length, discuss the direct question involved here, nor did it refer to other adverse decisions and rulings, but it certainly has most deliberately and in unequivocal language decided that the certificate defined by the law is absolutely necessary to the admission of any Chinese merchant. There existed in that case two reasons through which the Court could have reached its conclusion that the petitioner was not entitled to land, without deciding the direct question that must determine this case. First, it clearly appears from the record which was before the Supreme Court that the evidence was insufficient to establish the petitioner's character as a merchant, and, second, it also appears from such record that he had lived but two years in this country and seven in China immediately prior to his attempt to return. It is quite evident that his long residence in China was sufficient not only for him to have established some business or to have engaged in some occupation there and to have abandoned what he had here; but also to have enabled the Chinese Government to acquire such knowledge of his status there as would enable it to make the required certificate.

It may be urged that in any case, when a resident merchant here departs to some other country, although

intending to return, if he remains so long in such foreign country as to give him a residence and for his occupation to become fully known there, the reason why he should procure such certificate is as apparent and important as in the case of one coming for the first time. The fact that the Supreme Court did not assign either of these reasons as the basis of its judgment, but rested it alone upon the provisions of the statute, argues that the Court meant what it deliberately and plainly said I can not, therefore, view as an *obiter dictum* what
44 appears the vital part of that decision.

Even if I entertained a contrary opinion its announcement would not be justified. It would be an unfortunate practice for the Bar, litigants, and the people, should an inferior Court declare opinions which it believed in conflict with those of the superior Court, and especially when the latter is the highest in the land, and, at least, the peer of any in the world. My only course is to follow the rulings of that Court as I understand them. If I misconstrue them, that, or some other appellate court can correct my error. There is, however, another view to be taken of this law. When a statute is so plain that doubt can not be entertained that the legislators intended it as it reads, courts should not attempt to attach to it another construction from that plainly intended; but only ambiguous and unconstitutional statutes they may construe and overturn.
45 When this last Act was adopted, Congress had become familiar with the Chinese question and the legislation concerning it, and must have foreseen the effect of this. Moreover, when a Chinese subject returns to China and remains there many years, he should be required, before returning here, to procure a certificate of his occupation there. Seeing the necessity of such a rule in such cases, and the difficulty of fixing any limit of residence in a foreign country which should make it

"a merchant, was weak and unsatisfactory, *but the* "*statute itself does away with the necessity for any in-* "*vestigation by the Court as to its sufficiency, for it de-* "*clares that while the certificate may be contradicted by* "*the authorities of the United States*, and it is to be "taken by them only as *prima facie* evidence, *it shall* "*constitute the only evidence permissible on the part of* "*the person producing the same to establish his right to* "*enter the United States.*" And in the concluding clause of the opinion the Court reiterates the same view.

42

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It may be urged that in any case, when a resident merchant here departs to some other country, although

intending to return, if he remains so long in such foreign country as to give him a residence and for his occupation to become fully known there, the reason why he should procure such certificate is as apparent and important as in the case of one coming for the first time. The fact that the Supreme Court did not assign either of these reasons as the basis of its judgment, but rested it alone upon the provisions of the statute, argues that the Court meant what it deliberately and plainly said I can not, therefore, view as an *obiter dictum* what
44 appears the vital part of that decision.

Even if I entertained a contrary opinion its announcement would not be justified. It would be an unfortunate practice for the Bar, litigants, and the people, should an inferior Court declare opinions which it believed in conflict with those of the superior Court, and especially when the latter is the highest in the land, and, at least, the peer of any in the world. My only course is to follow the rulings of that Court as I understand them. If I misconstrue them, that, or some other appellate court can correct my error. There is, however, another view to be taken of this law. When a statute is so plain that doubt can not be entertained that the legislators intended it as it reads, courts should not attempt to attach to it another construction from that plainly intended; but only ambiguous and unconstitutional statutes they may construe and overturn.
45 When this last Act was adopted, Congress had become familiar with the Chinese question and the legislation concerning it, and must have foreseen the effect of this. Moreover, when a Chinese subject returns to China and remains there many years, he should be required, before returning here, to procure a certificate of his occupation there. Seeing the necessity of such a rule in such cases, and the difficulty of fixing any limit of residence in a foreign country which should make it

proper to secure such certificate, it seems probable that Congress intended the rule to become applicable to all coming here, whether for the first time or otherwise. At all events, the Supreme Court seems to have adopted this view and has left it to Congress to amend the law if it shall work hardship, as it undoubtedly may in cases like this. In accord, therefore, with what is deemed the ruling of that Court, it is now ordered that the writ be denied and the petitioner be remanded to the Empire of China.

(Signed:) BEATTY, Judge.

46 [ENDORSED:] Read in open court, Sept. 14, 1891.
L. S. B. SAWYER, Clerk.

At a stated term, to wit, the July term, A. D. 1891, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Northern District of California, held at the court room in the City and County of San Francisco on Monday, the 14th day of September, in the year of our Lord, one thousand eight hundred and ninety-one.

Present: The Honorable James H. Beatty, United States District Judge, District of Idaho.

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11,415.

47 This matter, heretofore submitted to the Court for consideration and decision upon an agreed statement of facts, having been duly considered, and the opinion of the Court having been read, it is ordered that Lau Ow Bew, the petitioner herein, be remanded to the custody whence he came, and judgment entered herein accordingly. It is further ordered that said petitioner be released from custody upon giving a bond in the sum of five hundred dollars.

It is further ordered that an appeal to the United

States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is, allowed, and that a certified transcript of the record and of all proceedings be forthwith transmitted to said United States Circuit Court of Appeals.

On motion of Thomas D. Riordan, attorney for said petitioner, it is ordered that a stay of proceedings for five days be granted.

48 **United States Circuit Court, Northern District of California.**

In the Matter of LAU OW BEW on *Habeas Corpus*. No. 11,415,

You will please take notice that the above-named Lau Ow Bew appeals to the Circuit Court of Appeals in and for the Ninth Judicial Circuit, from the order of remand and judgment made and entered herein by said Circuit Court on the 14th day of September, A. D. 1891, and from the whole and each and every part thereof.

Yours, &c.,

THOS. D. RIORDAN,
Attorney for Petitioner.

To Chas. A. Garter, Esq.,
U. S. Dist. Att'y and Clerk of said court.

49 [ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed Sept. 28, 1891.

L. S. B. SAWYER, Clerk.

**In the United States Circuit Court of Appeals for the Ninth Circuit.**

In the Matter of LAU OW BEW on *Habeas Corpus.*

Afterwards, to wit, on this first Monday in October in the same term, before the Judges of the Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the District of California,
50 comes the said Lau Ow Bew, appellant, by Harvey S. Brown and Thos. D. Riordan, his attorneys, and says that in this record aforesaid there is manifest error in this, to wit:

That the said Circuit Court of the Ninth Judicial Circuit, in and for the Northern District of California, erred in deciding:

1. That the appellant is not entitled to enter the United States.

2. That he is not unlawfully restrained of his liberty.

3. That the said appellant was required to produce the certificate required by section 6 of the Act known as the Chinese Restriction Act, passed May 6th, 1882, as amended July 5th, 1884.

4. That a Chinese merchant domiciled in the United States and departing therefrom temporarily with the intention of returning should, before being permitted to re-enter the United States, produce the certificate required by section 6 of the Act above referred to.

51 5. That he be remanded to the custody of the master of the steamship whence he was taken.

And the said Lau Ow Bew prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

HARVEY S. BROWN and
THOMAS D. RIORDAN,
Attorneys for Appellant.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER, Asst. U. S. Dist. Atty.

Filed Sept. 28, 1891.

L. S. B. SAWYER, Clerk.

52 UNITED STATES OF AMERICA, } ss.
*Northern District of California.* }

Be it remembered, that on this 14th day of September, 1891, before the undersigned, a commissioner duly appointed by the Circuit Court of the United States, Northern District of California, to take ackowledgment of bail and affidavits, etc., personally appeared Lau Ow Bew as principal, and Lou Chung, of the firm of Fook Wah & Co., No. 707 Dupont street, and Yee Lee, of the firm of Sun Quong Chong & Co., No. 710 Sacramento street, as sureties, and acknowledged themselves to owe and be indebted to the United States of America, as follows: that is to say, in the sum of five hundred dollars each, to be levied of their goods and chattels, lands and tenements, and the United States rendered, if default be made, in the conditions following:

53 The conditions of this recognizance are such, that whereas, the said Law Ow Bew has been produced before the Circuit Court of the United States, in and for the Northern District of California, upon a writ of *habeas corpus*, duly sued out of said Court upon petition, and has been duly admitted to bail by said court, pending the hearing of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of remand entered in said Circuit Court, in the sum of five hundred dollars.

Now, therefore, if the said Lau Ow Bew, shall personally appear before the said Circuit Court of the

United States, in and for the Northern District of California, at the court room thereof, at San Francisco, California, as he may from time to time be by said Court required to appear, and render himself amenable to any and all lawful orders and process of said
54 Court, and not depart the said Court without leave first obtained, and abide by the final order of said Court in said matter to be made and entered, and answer all costs in the premises, then this recognizance shall be void; otherwise to remain in full effect and virtue.

Chinese.
LAU X OW BEW. [SEAL.]
Signature.
Chinese.
LOU X CHUNG. [SEAL.]
Signature.
Chinese.
YEE X LEE. [SEAL.]
Signature.

Acknowledged before me, the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

55 UNITED STATES OF AMERICA, } ss.
*Northern District of California.* }

Lou Chung and Yee Lee, being duly sworn, each for himself, deposes and says, that he is a householder in said District, and is worth the sum of fifteen hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Chinese
LOU X CHUNG.
Signature.
Chinese
YEE X LEE.
Signature.

Sworn to before me this 14th day of September, A. D. 1891.

F. D. MONCKTON,
56 Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA, } ss:
*Northern District of California.* }

Lou Chung and Yee Lee, being duly sworn, each for himself, deposes and says, that his business and place of business are truly stated in the within bond, and that he resides in and owns property in the city and county of San Francisco, State of California, as follows:

Lou Chung, residence No. 707 Dupont street, owns $10,000 interest in the firm of Fook Wah & Co.

Yee Lee, residence No. 710 Sacramento street, owns $1,500 interest in the firm of Sun Quong Chong & Co.

Chinese
57 LOU X CHUNG.
Signature.

Chinese
YEE X LEE.
Signature.

Subscribed and sworn to before me, this 14th day of September, 1891.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

I hereby certify that I personally know each of the persons named in and who signed the within bond as sureties; that the name therein set forth and signed by him is the name by which he is generally known; that he is connected with the firm therein named as therein stated, and that I believe him to be amply worth the penalty thereof exclusive of property exempt
58 from execution, and over and above all his just debts and liabilities.

THOS. D. RIORDAN,
Attorney for Petitioner.

The form of the within bond and the sufficiency of the sureties thereon are approved.

HAWLEY, Judge.

W. G. WITTER, Assistant U. S. Attorney.

[ENDORSED:] Filed, September 28, 1891.

L. S. B. SAWYER, Clerk.

**In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.**

59

In the matter of LAU OW BEW on *Habeas Corpus*.

No. 11415.

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written and printed pages, numbered from 1 to 20 inclusive, to be a full, true, and correct copy of the record and all proceedings in the above and therein entitled matter, and that the same together constitute the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 3d day of October, A. D. 1891.

60 [SEAL.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA—*ss.*

*To the United States of America and to the Hon. Charles A. Garter, United States District Attorney for the Northern District of California, greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Circuit to be held at the city of San Francisco, State of California, on the 5th day
61 of October, A. D. 1891, pursuant to an order of the Circuit Court of the United States, Ninth Circuit Northern District of California, made and entered on the 14th day of September, A. D. 1891, allowing an appeal from the judgment and order of remand rendered and entered herein on said day in the matter of Lau Ow Bew on *habeas corpus*, wherein the said Lau Ow Bew is plaintiff in error and you are defendant in error, to show cause, if any there be, why the errors in the said *habeas corpus* proceeding mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas P. Hawley, U. S. District Judge for the District of Nevada, assigned to hold and holding U. S. Circuit Court for the Northern District of California, this 28th day of September, A. D. 1891, and of the Independence of the United
62 States the one hundred and sixteenth.

THOMAS P. HAWLEY, Judge.

[ENDORSED:] Due service of a copy of the within is hereby admitted this 28th day of September, 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed Sept. 28, A. D. 1891.

L. S. B. SAWYER, Clerk.

63 [ENDORSED:] Service of a copy of the within transcript is hereby admitted this 3d day of October, A. D. 1891.

W. G. WITTER,
Asst. U. S. Dist. Atty.

Filed October 3d, 1891.

F. D. MONCKTON, Clerk.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of the printed transcript of the record in the cause entitled Lau Ow Bew, appellant, *vs.* The United States of America, appellee, No. 12, as the original thereof remains of record in my office.

Attest my hand and seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON, Clerk.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Respondent. } No. 12.

BY THE COURT:

It is conceded by counsel for the appellant that in the case of Wan Shing *v.* United States, 140 U. S., 424, the Supreme Court decided the point involved in the present appeal adversely to the appellant. Nevertheless we are asked, by virtue of the sixth section of the Act creating this Court, to certify the case to the Supreme Court for instructions upon the ground, as is claimed, that that Court might have decided the case of Wan Shing *v.* United States the same way for other reasons than those assigned as the basis of the decision, and because in that case the attention of the Court was not called to certain provisions of the Act of Congress, the consideration of which, it is claimed, would have wrought a different result. There is nothing in the opinion of the court to indicate that its attention was not called to the clauses of the Act referred to. The

precise point was decided, and we are bound to presume that every provision of the law bearing upon the subject was considered by the Court. We can not put ourselves in the attitude of asking instructions upon a point already decided. If, as is contended on the part of the appellant, the case of Wan Shing *v.* United States was not fully presented to the court, and if, as is said, the Treasury Department of the Government in enforcing the provisions of the Act of Congress involved in Wan Shing's case, is giving it a different construction from that given by the Court, whose province it is to construe and declare its meaning, under the belief that the Court did not really intend to decide what it did decide, or if, for any cause, the Supreme Court may wish to reconsider the question, an application to that tribunal to cause the record in the present case to be certified up to it may afford the appellant the remedy he seeks. For this Court there is nothing to do but to affirm the judgment on the authority of the case cited, and it is ordered accordingly.

[ENDORSED:] Read in open court, and filed October 7, 1891.

F. D. MONCKTON,
*Clerk.*

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of an opinion this day read in open court and filed in the cause entitled Lau Ow Bew, appellant, *v.* The United States of America, appellees, No. 12, in said Circuit Court of Appeals.

Attest my hand and seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*

AT A STATED TERM, to wit, the October term, A. D. 1891, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room in the city and county of San Francisco, on Wednesday, the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable E. M. Ross, United States District Judge for the Southern District of California; Honorable Thomas P. Hawley, United States District Judge for the District of Nevada.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Appellees. } No. 12.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the said Circuit Court of the United States for the Northern District of California, and was argued by counsel, and the same having been duly considered, and the opinion of the Court having been read in open Court and filed with the clerk, it is ordered that the judgment of the said Circuit Court be, and the same hereby is, affirmed, and the cause remanded to said Circuit Court at the cost of the appellant.

On motion of Thomas D. Riordan, Esq., counsel for the appellant, it is ordered that a stay of proceedings herein be, and the same hereby is, granted for and during the space of thirty days.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within entitled cause.

Attest my hand and the seal of said Circuit Court of Appeals this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*

[ENDORSED:] No. 12. U. S. Circuit Court of Appeals for the Ninth Circuit. Lau Ow Bew, appellant, *v.* The United States. Certified copy of order.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

No. 12, October term, 1891.

LAU OW BEW, Appellant,
*vs.*
THE UNITED STATES, Appellee. } Judgment.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the said Circuit Court of the United States, for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same hereby is affirmed, and the cause remanded to the said Circuit Court, at the cost of the appellant.

Judgment entered this 7th day of October, 1891.

F. D. MONCKTON,
*Clerk.*

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of an original judgment this day entered in the above entitled cause and that the same, together with the certified copy of the transcript of record, the brief of appellant, the opinion of the court, and the order of court hereto annexed, constitute a complete copy of the record in said cause.

Attest my hand and seal of said Circuit Court of Appeals, this 7th day of October, A. D. 1891.

[SEAL.] F. D. MONCKTON,
*Clerk.*